EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

. 85-1409-CFX
atus: GRANTED

cketed:
ruary 21, 1986

Title: Otis R. Bowen, Secretary of Health and Human Services, Petitioner
v.
Janet J. Yuckert

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Douglas,James A., Grossman,Carole F.

try	Date	Note	Proceedings and Orders
1	Jan 11 1986		Application for extension of time to file petition and order granting same until February 21, 1986 (Rehnquist, January 14, 1986).
2	Feb 21 1986	G	Petition for writ of certiorari filed.
4	Mar 27 1986		Order extending time to file response to petition until April 21, 1986.
5	Apr 23 1986		DISTRIBUTED. May 15, 1986
6	Apr 21 1986		Brief of respondent Janet J. Yuckert in opposition filed.
7	Apr 21 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	May 13 1986		Lodging received.
9	May 13 1986	X	Reply brief of petitioner Bowen, Sec. of HHS filed.
10	May 19 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	May 19 1986		Petition GRANTED.
			**********
13	Jun 30 1986		Order extending time to file brief of petitioner on the merits until August 2, 1986.
14	Aug 1 1986		Brief of petitioner Bowen, Sec. of HHS filed.
15	Aug 15 1986		Joint appendix filed.
17	Aug 21 1986		Order extending time to file brief of respondent on the merits until October 2, 1986.
18	Aug 20 1986		Lodging received.
19	Sep 29 1986		Order further extending time to file brief of respondent on the merits until October 7, 1986.
20	Oct 6 1986		Brief amicus curiae of Alabama, et al. filed.
21	Oct 6 1986		Brief amicus curiae of New York, et al. filed.
22	Oct 7 1986		Brief amicus curiae of American Assn. of Retired Persons filed.
23	Oct 6 1986		Brief amicus curiae of American Diabetes Assn., et al filed.
24	Oct 9 1986		Record filed.
25	Oct 9 1986		Certified original record & C.A. proceedings, 2 volumes, received.
26	Oct 9 1986		Lodging entitled "Disability" received.
27	Oct 20 1986		Brief of respondent Janet Yuckert filed.
28	Oct 28 1986		CIRCULATED.
29	Nov 14 1986		SET FOR ARGUMENT. Tuesday, January 13, 1987. (2nd case)
30	Jan 7 1987		Lodging received.
31	Jan 6 1987	X	Reply brief of petitioner Bowen, Sec. of HHS filed.

. 85-1409-CFX

try	Date	Note	Proceedings and Orders
:	Jan 13 1987		ARGUED.

CORRECTED COPY

(2)

No. 85 1409

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

75 pp

QUESTION PRESENTED

Whether the court of appeals correctly invalidated a regulation promulgated by the Secretary of Health and Human Services, 20 C.F.R. 404.1520(c), which provides that a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Statutes and regulations:

Statutes and regulations – Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 774 F.2d 1365. The order of the district court (App., *infra*, 14a) and the recommendation of the magistrate (App., *infra*, 15a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985. By order dated January 14, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 223(d)(1)(A) and (2)(A), 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 423(d)(1)(A) and (2)(A), 1382c(a)(3)(A) and (B); Sections 223(d)(2)(C), 1614(a)(3)(G) of the Social Security Act, as added by Section 4 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800-1801 (to be codified at 42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(G)); and 20 C.F.R. 404.1520, 404.1521, 416.920, 416.921 are reproduced at App., *infra*, 30a-36a.

STATEMENT

The court of appeals in this case invalidated a regulation that is an integral part of the sequential evaluation process established by the Secretary of Health and Human Services for determining whether a person seeking Social Security disability benefits is disabled. The regulation provides that if the claimant does not have a medically "severe" impairment—defined to mean an impairment that significantly limits a person's mental or physical ability to do the basic work activities that are necessary for most jobs—the claimant will be found not to be disabled.

A. THE STATUTORY AND REGULATORY FRAMEWORK

Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability." 42 U.S.C. 423(a)(1)(D). Disability benefits also are provided under the Supplemental Security Income (SSI) program established by Title XVI of the Act. 42 U.S.C. 1382(a). The term "disability" is defined to mean

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. 423(d)(1)(A); see also 42 U.S.C. 1382c(a)(3)(A).

The Act further provides in relevant part that an individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

To implement these statutory definitions, the Secretary has by regulation established a five-step "sequential evaluation" process to be followed in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. See *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983). At step 1, the decision-maker (either the state agency or the administrative law judge (ALJ)) determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is found not to be disabled. 20 C.F.R. 404.1520(b), 416.920(b).

If the claimant is not engaged in substantial gainful activity, the sequential evaluation process continues to step 2, which is at issue in this case. At step 2, the decision-maker determines whether the individual has demonstrated the existence of a medically "severe" impairment or combination of impairments. 20 C.F.R. 404.1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1521(a),

416.921(a)). The regulations in turn define the term "basic work activities" to mean "the abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b), 416.921(b)), which are identified as: (1) "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; (2) "[c]apacities for seeing, hearing, and speaking"; (3) "[u]nderstanding, carrying out, and remembering simple instructions"; (4) "[u]se of judgment"; (5) "[r]esponding appropriately to supervision, co-workers and usual work situations"; and (6) "[d]ealing with changes in a routine work setting" (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant does not have an impairment that significantly limits his ability to do these basic work activities, he will be found not to be disabled at step 2, without specific consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).

If the claimant is found to have a "severe" impairment, the decision-maker then must determine at step 3 of the sequential evaluation process whether the impairment is so serious as to be equal in severity to one of the listed impairments that are deemed to be disabling on medical grounds alone, without specific consideration of the claimant's age, education, and work experience. 20 C.F.R. 404.1520(d), 416.920(d); 20 C.F.R. Pt. 404, Subpt. P, App. 1. If the individual's impairment is not one that is automatically deemed disabling at step 3, the decision-maker then must determine at step 4 whether the impairment prevents the individual from performing his own past work. If the claimant is still able to do his past work, he is found not to be disabled. 20 C.F.R. 404.1520(e), 416.920(e). But if the claimant cannot do his past work, the decision-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he nevertheless can perform other work that exists in the national economy. At this final step, the

Secretary ordinarily applies the medical-vocational guidelines that were sustained by this Court in *Heckler* v. *Campbell, supra.*[1]

B. THE PROCEEDINGS IN THIS CASE

1. Respondent applied for Social Security disability benefits and SSI benefits in October 1980 (R. 82, 86).[2] After her claim was denied by the state agency, respondent requested a hearing before an ALJ. Respondent alleged that she was disabled on the basis of labyrinthe (inner ear) dysfunction with occasional episodes of dizziness, loss of visual focus, and flat feet (App., *infra*, 15a, 26a).

Following the hearing, the ALJ concluded that respondent's impairments were not severe and denied her claim (App., *infra*, 24a-27a). The record showed that respondent was 45 years old and had a high school education, two years of business college, and real estate training (*id.* at 26a). From 1963 to 1977, she had been employed as a travel agent (*id.* at 15a, 26a; R. 52). From September 1978 through September 1979, with interruptions due to illness, respondent worked in real estate sales (App., *infra*, 15a); she testified that "the market kind of just fell because of the high interest rates and so I left that job in September of 1979" (R. 52). The ALJ found that "[m]ultiple tests given [to respondent] failed to divulge objective clinical findings

---

[1] The sequence in which the severity of an impairment is considered is somewhat different under the recently promulgated regulations governing the evaluation of claimants who already are receiving disability benefits. See 50 Fed. Reg. 50135-50136, 50142-50143 (1985), adding 20 C.F.R. 404.1594(f), 416.994(b)(5). The different sequence was adopted in order to take account of the new medical improvement standard enacted in Section 2 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794-1799. This case involves a new applicant for benefits, not a current recipient, and it therefore is governed by the regulations discussed in the text.

[2] "R." refers to the transcript of the administrative record that was certified to the district court pursuant to 42 U.S.C. 405(g).

of abnormalities that support [respondent's] severity of the stated impairments" (App., *infra*, 27a), observing that respondent was successfully pursuing a "relatively difficult" two-year community college training plan for computer programming (*id.* at 27a-28a). In the ALJ's view, although the evidence revealed that respondent was not "free from episodes of dizziness, or vision problems," her scholastic success, "coupled with generally negative clinical findings" and her ability to perform various activities, such as driving her car 80 to 90 miles a week, demonstrated that her problems did not significantly limit her ability to perform basic work activities (*id.* at 28a).[3] Accordingly, the ALJ concluded that respondent had not demonstrated the existence of a severe impairment within the meaning of 20 C.F.R. 404.1520(c), 416.920(c), and therefore was not disabled (App., *infra*, at 28a-29a).

The Appeals Council denied respondent's request for review (App., *infra*, 21a-22a), explaining that additional psychological testing data submitted to the Appeals Council by respondent's representative did not undermine the ALJ's decison (*id.* at 22a):

> The over-all results of the testing indicated an average range of intellectual abilities, with no profound irregularities and the majority of skills still fully intact. Only the finger dexterity test administered showed a degree of difficulty. The Appeals Council notes in that regard that the limitations potentially imposed by the difficulty you might experience in small detailed parts dexterity does not indicate an inability to perform any substantial gainful activity. The weight

[3] The ALJ noted that Janet Mott, a vocational expert called by respondent, had testified that respondent's medical condition would preclude her from working competitively, but the ALJ concluded that the objective clinical diagnostic findings in the record did not support the existence of an impairment of that severity and that respondent "is exaggerating the effects of her impairments" (App., *infra*, 27a, 28a).

> of the entire evidence of record in your case, including the new evidence, supports the administrative law judge's finding that you do not have any significant impairment of work-related abilities.

2. Respondent then sought judicial review in the United States District Court for the Western District of Washington pursuant to 42 U.S.C. 405(g). The case was referred to a magistrate, who recommended that the district court affirm the Secretary's decision that respondent had not established that she had a severe impairment (App., *infra*, 15a-19a). The magistrate noted the testimony by respondent's vocational expert and treating physician that her impairments were disabling, but found that respondent's success in the community college program "is substantial evidence of her ability to perform basic work activities" (*id.* at 17a-19a). The magistrate also observed that this course had been sponsored by the state Department of Vocational Rehabilitation and that respondent's counsellor at that agency had expressed the view that respondent would have little problem in obtaining employment when she completed that training (*id.* at 18a). The district court adopted the magistrate's report and affirmed the Secretary's decision denying respondent's claim (*id.* at 14a, 20a).

3. The court of appeals reversed (App., *infra*, 1a-12a). The court of appeals did not reach the question whether there was substantial evidence to support the Secretary's decision that respondent had not demonstrated the existence of a severe impairment that significantly limited her ability to do basic work activities. Instead, the court held that the regulation that permits the Secretary to deny benefits at step 2 of the sequential evaluation process because of the absence of a severe impairment is invalid.[4]

[4] The court of appeals acknowledged that respondent had not challenged the regulation in district court, but it chose to consider the issue because it is "purely one of law" and "a significant question of general impact" (App., *infra*, 4a-5a).

The court therefore remanded the case to the Secretary to be reconsidered without reliance on the severity regulation.

a. The court of appeals recognized that under 42 U.S.C. 405(a), "Congress has delegated to the Secretary broad power 'to prescribe standards for applying certain sections of the [Social Security] Act' " (App., *infra*, 8a, quoting *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 40 (1981)). However, the court held that the severity regulation is inconsistent with 42 U.S.C. 423(d)(2)(A), which provides that a claimant may be found to be disabled only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." The court interpreted this provision to require the Secretary "to consider factors such as [the claimant's] age, education, work experience, and ability to do past work" in every individual disability determination, irrespective of whether the claimant has demonstrated that his impairment satisfies a threshold level of severity. App., *infra*, 5a, 9a. The court also held that the regulation is contrary to judicial decisions that it construed to mandate a two-step process, "with the claimant first showing an inability to perform [his] past relevant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work" (*id.* at 10a).

Finally, the court of appeals rejected the Secretary's contention that the Social Security Disability Benefits Reform Act of 1984 (1984 Act), supports the sequential evaluation process (App., *infra*, 8a-9a). The court conceded that Congress considered the severity regulation when it enacted the 1984 Act and failed to eliminate the requirement that the claimant demonstrate a severe impairment. However, relying on the fact that Congress had urged the Secretary to revise the severity criteria in order

" 'to reflect the real impact of impairments on the ability to work' " (*id.* at 10a, quoting H.R. Rep. 98-618, 98th Cong., 2d Sess. 8 (1984)), the court believed that the legislative history did not suggest a congressional intent to permit a finding of nondisability based on medical factors alone (App., *infra*, 10a).

b. The court of appeals acknowledged in a footnote (App., *infra*, 9a n.6) that the Secretary had adopted a new Social Security Ruling, SSR 85-28 (App., *infra*, 37a-44a), which reflected both the Secretary's ongoing reevaluation of step 2 and the Secretary's response to concerns expressed by several courts of appeals. In SSR 85-28, the Secretary explained that the severity regulation, which was promulgated in 1978[5] and revised somewhat in 1980,[6] had not been intended to alter the threshold level of impairment severity that had been in effect prior to 1978. Under the pre-1978 standard, a claimant could be found not to be disabled on medical grounds alone (*i.e.*, without consideration of his age, education, and work experience) if his impairment was "a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities." 20 C.F.R. 404.1502(a) (1977). Thus, the Secretary emphasized in SSR 85-28 that benefits are to be denied at step 2 only when an individual's impairments "would have no more than a minimal effect on [his] ability to work even if the individual's age, education, or work experience were specifically considered" (App., *infra*, 41a). The court of appeals recognized that SSR 85-28 interpreted the severity regulation in the same manner as that approved by five

---

[5] 43 Fed. Reg. 55363, 55371 (1978), adding 20 C.F.R. 404.1503(c), 404.1504(a)(1), 416.903(c), 416.904(a)(1).

[6] 45 Fed. Reg. 55588, 55624-55625 (1980), adding 20 C.F.R. 404.1520(c), 404.1521, 416.920(c), 416.921.

other circuit courts. *Id.* at 8a-9a n.6.[7] However, the court expressed no view on the validity of the new ruling because it had not then been formally published and because the court in any event held that "the regulation it interprets is inconsistent with the Social Security Act" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated a regulation that is an integral part of the five-step sequential evaluation process established by the Secretary of Health and Human Services to facilitate the fair, efficient, and uniform adjudication of the more than two million claims for disability benefits that are filed each year under the Social Security Act. The severity regulation serves an important screening function that makes it unnecessary to engage in a particularized vocational evaluation where a medical assessment establishes that the claimant's impairment is sufficiently insubstantial that it could not reasonably be expected to preclude all substantial gainful activity irrespective of the claimant's age, education, and work experience. The principle reflected in this regulation – that a person may denied disability benefits on the basis of medical factors alone – has been a feature of the disability program since its inception in 1954, and it has been endorsed by Congress on several occasions since that time.

The court of appeals completely disregarded the compelling legal support and practical justifications for the regulation it invalidated. Although several other courts of appeals also have invalidated the severity regulation, it has been sustained by still other courts of appeals as an appro-

[7] Citing *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (6th Cir. 1985); *Estran* v. *Heckler*, 745 F.2d 340, 341 (5th Cir. 1984); *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady* v. *Heckler*, 724 F.2d 914, 920 (11th Cir. 1984); *Chico* v. *Schweiker*, 710 F.2d 947, 954-955 & n.10 (2d Cir. 1983).

priate screening mechanism for claimants who have relatively minimal impairments. This circuit conflict warrants resolution by this Court, especially in light of the widespread class action litigation on this issue in the lower courts. It is essential that the Secretary and the state agencies know whether the severity regulation may be applied to the scores of thousands of disability claims that are filed each month.

1. As this Court observed with respect to another provision of the sequential evaluation regulations (the medical-vocational guidelines), "Congress has 'conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act' " (*Heckler* v. *Campbell*, 461 U.S. at 466, quoting *Schweiker* v. *Gray Panthers*, 453 U.S. at 43). Congress has conferred that authority in 42 U.S.C. 405(a), which authorizes the Secretary to adopt reasonable regulations to "provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. "Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation," a court's review "is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Heckler* v. *Campbell*, 461 U.S. at 466. The severity regulation plainly suffers from neither defect. To the contrary, the support for the regulation in the legislative evolution of the relevant statutory provisions is overwhelming.

a. The basic definition of the term "disability," enacted by Congress in Section 106(d) of the Social Security Amendments of 1954, ch. 1206, 68 Stat. 1080, is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental

impairment * * *." [8] The Senate and House Reports explain this definition in identical language:

> There are two aspects of disability evaluation: (1) *There must be a medically determinable impairment of serious proportions* which is expected to be of long-continued and indefinite duration or to result in death, and (2) there must be a present inability to engage in substantial gainful work by reason of such impairment * * *. The physical or mental impairment *must be of a nature and degree of severity sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work.*

H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954) (emphasis added). The first of the two "aspects" of the disability evaluation articulated by the congressional reports strongly supports the Secretary's adoption of an independent threshold requirement that the impairment be of "serious proportions" from a medical perspective alone. Only if that condition is met is it necessary for the decision-maker to consider the second aspect: whether the claimant is unable to work by reason of "such impairment." The second sentence quoted from the committee reports likewise makes clear Congress's intent that the impairment must rise to a certain threshold level of severity before it may even be considered as the cause of the claimant's alleged inability to work.

---

[8] In the 1954 amendments, Congress provided for the preservation of the right to old age and survivor's insurance during a period of extended disability; Congress did not then provide for the payment of benefits to a person because of his disability. See H.R. Rep. 1698, 83d Cong., 2d Sess. 22-24 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 20-22 (1954). The definition of the term "disability" for purposes of the 1954 amendments is contained in Section 216(i) of the Act, 42 U.S.C. 416(i). That definition was carried forward verbatim in 42 U.S.C. 423(d)(1)(A), at issue here, when Congress enacted the Title II disability benefits program in 1956. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815.

This congressional intent was implemented in the regulations issued by the Secretary in 1960 to give content to the statutory terms. As promulgated in 1960 (25 Fed. Reg. 8100), the applicable regulation provided in pertinent part (20 C.F.R. 404.1502(a) (1961) (emphasis added)):

> Whether or not an impairment in a particular case constitutes a disability * * * is determined from all the facts of that case. *Primary consideration is given to the severity of the individual's impairment.* Consideration is also given to such other factors as the individual's age, education, training and work experience. However, *medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or similar abnormality or combination of slight abnormalities.*

The language of the regulation remained in effect in essentially identical form until 1978, when the sequential evaluation regulations were formally adopted. See pages 3-5, *supra*, and pages 20-21, *infra*. The interpretation of the Act reflected in the severity regulation therefore is a consistent and longstanding one, and it accordingly is entitled to particular deference by the courts. *Pattern Makers* v. *NLRB*, No. 83-1894 (June 27,1985), slip op. 19-20.

b. In 1967, Congress reexamined the operation of the disability program and added 42 U.S.C. 423(d)(2)(A). Pub. L. No. 90-248, § 158(b), 81 Stat. 868. The court of appeals interpreted Section 423(d)(2)(A) to prohibit the denial of benefits based on medical factors alone, without consideration of the vocational factors of the claimant's age, education, and work experience. App., *infra*, 5a, 9a. There is no support for this proposition. To the contrary, the legislative history of the 1967 amendments demonstrates that Congress was attempting to establish *more*

stringent requirements for determining disability, and that history in fact lends additional support to the validity of the severity regulation.

The 1967 amendments were enacted against the background of the regulations promulgated by the Secretary in 1960 to implement the basic definition of the term "disability" in 42 U.S.C. 423(a)(1)(A). As we have explained, those regulations expressly provided that medical considerations alone would support a finding of no disability. 20 C.F.R. 404.1502(a) (1967). Congress in 1967 did not amend 42 U.S.C. 423(a)(1)(A) or otherwise express its disapproval of this formal and settled administrative construction of the term "disability." When Congress thoroughly reexamines a statutory program and revises that program in certain respects, this Court has understood Congress to have approved those aspects of the program that it left unaltered. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982). That conclusion is particularly compelling here.

In enacting the new 42 U.S.C. 423(d)(2)(A), Congress added an *additional* condition of eligibility: Not only is the claimant required to establish a mental or physical impairment of "serious proportions" and of "a nature and degree of severity" sufficient to justify its consideration as the cause of an inability to perform any work, as Congress intended when it enacted 42 U.S.C. 423(d)(1)(A) (see page 12, *supra*); under Section 423(d)(2)(A), a claimant who meets that requirement also must demonstrate that his "impairment or impairments are of *such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added)). Nothing in this additional requirement undermines the validity of the threshold requirement that the claimant's impairment be severe.

The legislative history confirms that Congress intended no such departure from settled practice. The House and Senate Reports explain the method for determining disability that Congress contemplated when it enacted the new statutory requirement in 42 U.S.C. 423(d)(2)(A):

> The bill would provide that such an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments*; that if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability; and that if, considering the severity of his impairment together with his age, education, and experience, he has the ability to engage in some other type of substantial gainful work that exists in the national economy even though he can no longer do his previous work, he also is not under a disability * * *.

S. Rep. 744, 90th Cong., 1st Sess. 48-49 (1967) (emphasis added); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967). This description is a blueprint for the sequential evaluation process subsequently adopted by the Secretary in 1978, and the emphasized passage plainly supports the requirement that a claimant make a threshold showing that his impairment is "severe" before it is necessary for the Secretary to consider his age, education, and work experience.[9]

---

[9] In enacting the further restriction in 42 U.S.C. 423(d)(2)(A), Congress responded to administrative and judicial developments that suggested that the standard of eligibility had become too relaxed, and it "reemphasize[d] the predominant importance of medical factors in the disability determination." S. Rep. 744, 90th Cong., 1st Sess. 48 (1967). This background obviously does not support the court of appeals' view (App., *infra*, 5a, 9a) that the enactment of Section 423(d)(2)(A) was intended to *prohibit* the pre-existing policy of denying benefits on the basis of medical factors alone in appropriate circumstances.

Consistent with this view, when the Secretary in 1968 promulgated comprehensive disability regulations to take account of the 1967 amendments, he carried forward the pre-existing authorization in 20 C.F.R. 404.1502(a) (1967) for the denial of benefits based on medical grounds alone. 33 Fed. Reg. 11749, 11750 (1968).[10] At the very least, the Secretary's retention of this regulation was based on a permissible construction of the 1967 amendments and their legislative history. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7.

c. In 1978, the Secretary promulgated the first version of regulations that formally established the sequential evaluation process for adjudicating disability claims. See 43 Fed. Reg. 55349; *Heckler* v. *Campbell*, 461 U.S. at 460. Those regulations required the decision-maker to determine at step 2 whether the claimant's impairment was "severe," and they explained that "[a] medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions." 43 Fed. Reg. 55363 (1978), adding 20 C.F.R. 404.1504(a)(1). The Secretary stressed that this definition was intended to be only a "clarification" of the prior regulation, which allowed a claim to be denied where the claimant's impairment was

[10] When Congress enacted the SSI program in 1972 (Pub. L. No. 92-603, § 301, 86, Stat. 1465), it incorporated into 42 U.S.C. 1382c(a)(3)(A) and (B) the definition of the term "disability" in 42 U.S.C. 423(a)(1)(A) and (2)(A) (see 86, Stat. 1471-1472), without expressing any disapproval of the longstanding interpretation of those provisions contained in the Secretary's regulations. See S. Rep. 92-1230, 92d Cong., 2d Sess. 384 (1972). When Congress incorporates statutory provisions from one program into another in this manner, it is presumed to be aware of the interpretation of those provisions and to intend that interpretation to be applied under the second program. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). See also *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985), slip op. 12 & n.15; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 381-382. Congress's action in 1972 thus lends further support to the validity of the severity regulation.

"slight" (43 Fed. Reg. 58353 (1978)); that "there is no intention to alter the levels of severity for a finding of * * * not disabled on the basis of medical considerations alone" (*ibid.*; see also *id.* at 9297); and that the regulation addresses impairments that "have such a minimal effect on the individual that they would not be expected to interfere w[illegible] his or her ability to work, irrespective of his or her age, education, and work experience" (*id.* at 9296). The same severity concept was carried forward again in 1980 when the Secretary thoroughly revised the disability regulations. See 45 Fed. Reg. 55574 (1980), adding 20 C.F.R. 404.1520, 404.1521. The Secretary explained that the more detailed provisions were expected to result in "greater program efficiency" by limiting the number of cases in which it would be necessary to follow the full vocational evaluation procedures in 20 C.F.R. 404.1545-404.1568, 416.945-416.968. See 45 Fed. Reg. 55574 (1980).

d. It was against this background that Congress thoroughly studied the Social Security disability programs in the early 1980's and enacted the Social Security Disability Benefits Reform Act of 1984. Although Congress specifically considered the severity regulation and mandated one change in its application that is not at issue here, Congress otherwise expressed its approval of the severity step.

In Section 4 of the 1984 Act, Congress added a new paragraph (C) to 42 U.S.C. 423(d)(2) and a new paragraph (G) to 1382c(a)(3). These new paragraphs now require consideration of the combined effect of multiple impairments. 98 Stat. 1800-1801. The statutory language Congress employed expressly refers to the severity determination at step 2 (emphasis added)):

> In determining whether an individual's physical or mental impairment or impairments are of a *sufficient medical severity* that such impairment or impairments

> could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a *medically severe combination* of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

The first sentence of this new paragraph on its face plainly contemplates a threshold determination of "medical severity," and the second sentence contemplates that the subsequent steps of the "disability determination process" (which include the steps at which the claimant's age, education, and work experience are considered) will be reached only "[i]f the Secretary does find a medically severe combination of impairments."

If there could be any remaining doubt about Congress's intent in 1984 to preserve the severity step of the sequential evaluation process, it is dispelled by the legislative history of Section 4 of the 1984 Act. The Senate Report states:

> [T]he Committee wishes to emphasize that the new rule [requiring the consideration of multiple impairments] is to be applied in accordance with the existing sequential evaluation process and is not to be interpreted as authorizing a departure from that process. As the Committee stated in its report on the 1967 amendments, an individual is to be considered eligible "only if it is shown that he has a severe medically determinable physical or mental impairment or impairments."[11] *The amendment requires the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe.*

[11] See S. Rep. 744, *supra*, at 48, quoted at page 15, *supra*.

S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984) (emphasis added). See also H.R. Rep. 98-618, 98th Cong., 2d Sess. 6-8, 14 (1984). The Conference Report also recognizes that "[u]nder current policies, if a determination is made that a claimant's impairment is not severe, the consideration of the claim ends at that point" (H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 30 (1984)). The Conference Report then continues (*ibid.* (emphasis added)):

> The conferees also believe that in the interests of reasonable administrative flexibility and efficiency, a determination that an individual is not disabled may be based on a judgment that an individual has no impairment, or that the *medical severity of his impairment or combination of impairments is slight enough to warrant a presumption, even without a full evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current "sequential evaluation process" allows such a determination and the conferees do not intend to either eliminate or impair the use of that process.* The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for nonsevere impairments and expect that the Secretary will report to the Committees the results of this evaluation.

Contrary to the court of appeals' view (App., *infra*, 8a-9a), it is difficult to see how Congress could more clearly have expressed its intent in 1984 to permit continued use of the severity step, and not to require the decision-maker to consider the vocational factors of age, education, and work experience at that step.[12] The fact that Congress

[12] See also 130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984) (remarks of Sen. Long):

> [The Conference Committee's] language clearly indicates that Congress envisions a sequential approach to evaluating disability. The individual must first demonstrate the existence of an impairment or combination of impairments which are sufficiently severe

recognized that the *Secretary* intended to reevaluate the criteria for determining what impairments are severe under the regulation does not authorize a *court* to invalidate the regulation altogether, as the court of appeals seemed to believe (App., *infra*, 10a).[13]

Consistent with the text and legislative history of Section 4 of the 1984 Act, the Secretary, in March 1985, promulgated revised versions of 20 C.F.R. 404.1520, 404.1521, 416.920, 416.921. The revised regulations take into acccount the combined effect of multiple impairments, but otherwise leave in place the step 2 require-

from a medical standpoint as to meet the Secretary's criteria as to what could potentially be a disabling condition. If, and only if, the individual meets this test, there would be further evaluation as to whether that condition or combination of conditions does in fact preclude him from engaging in substantial work activity in the light of his age, education and work experience.

[13] The Secretary has taken several steps in furtherance of the reevaluation to which the Conference Committee referred. First, in April 1985, the Secretary rescinded SSR 82-55, which had provided a list of illustrative examples of impairments generally considered to be nonsevere. See SSR 85-III-II, at 47 (Apr. 1985). The court of appeals cited this ruling (App., *infra*, 10a-11a n.8), but without noting that it had been rescinded. Second, in November 1985, the Secretary issued SSR 85-28, discussed at pages 9-10, *supra*. SSR 85-28 emphasizes that a finding of "not severe" is made at step 2 when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered" (App., *infra*, 41a). In addition, the Secretary made clear to adjudicators resolving disability claims at the administrative level that "[g]reat care" should be used in applying the nonsevere concept (*id.* at 44a) and that denials at step 2 are appropriate only when the medical evidence "clearly establishe[s]" that the impact of medical impairments is minimal or slight (*id.* at 42a). By these instructions, the Secretary sought to address concerns expressed by several courts of appeals that the severity regulation had been applied in a manner that departed from the "slight impairment" standard (*id.* at 37a). See, *e.g.*, *Stone* v. *Heckler*, 752 F.2d 1099, 1102, 1106 (5th Cir. 1985); *Baeder* v. *Heckler*, 768 F.2d 547, 553 (3d Cir. 1985).

ment that the claimant demonstrate a medically severe impairment or combination of impairments that significantly limits his ability to perform basic work functions. 50 Fed. Reg. 8727-8728 (1985). The Secretary concluded in promulgating the regulations that Congress intended when it passed the 1984 Act to permit a finding of no disability to be based solely on medical considerations. See 50 Fed. Reg. 8726 (1985). That manifestly is a permissible interpretation of Congress's action. The severity regulation should have been sustained by the court of appeals on this ground alone. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, slip op. 5. But when Congress's most recent affirmation of the severity regulation is considered in light of the firmly entrenched nature of the provision in the administration of the disability program and the solid basis for the regulation in the legislative history of the 1954 and 1967 amendments, the support for the regulation is overwhelming. The court of appeals therefore clearly erred in invalidating the regulation on its face.

2. Despite the compelling support for the validity of the severity regulation, the Ninth Circuit is not alone in invalidating it.[14] The Seventh Circuit also invalidated the regulation, at least as applied to certain claimants, in an Illinois-wide class action. *Johnson* v. *Heckler*, 769 F.2d 1202 (7th Cir. 1985). Compare *Bunch* v. *Heckler*, No. 84-3102 (7th Cir. Dec. 5, 1985), slip op. 5-6 n.4. The Secretary's petition for rehearing en banc in *Johnson* was denied by an equally divided vote (776 F.2d 166 (1985)), and the Solicitor General has determined that a petition

[14] A district court, in a Ninth Circuit-wide class action, previously had held the regulation invalid and enjoined its enforcement. *Smith* v. *Heckler*, 595 F. Supp. 1173 (E.D. Cal. 1984), appeal pending, No. 85-2178 (9th Cir.). The appeal in *Smith* is currently under submission to a different panel of the Ninth Circuit, which previously had expressed its intent to defer its decision pending the panel's decision in this case.

for a writ of certiorari will be filed to seek review of the Seventh Circuit's decision. The Third Circuit, in *Baeder* v. *Heckler*, 768 F.2d 547 (1985), likewise held that the regulation is invalid in its current application, although the precise scope of the holding is unclear.[15] See also *Hansen* v. *Heckler*, No. 84-2366 (10th Cir. Feb. 5, 1986), slip op. 9-13. By contrast, the Sixth Circuit has expressly sustained the regulation, correctly construing it to provide for the denial of benefits to claimants who have "slight" or "minimal" impairments. See *Salmi* v. *Secretary of Health & Human Services*, 774 F.2d 685, 689-692 (1985); *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (1985); *Gist* v. *Secretary of Health & Human Services*, 736 F.2d 352, 357-358 (1984). Other courts of appeals also have recognized the validity of the regulation when construed in this manner. See *Garza* v. *Heckler*, 771 F.2d 871-873 (5th Cir. 1985); *Stone* v. *Heckler*, 752 F.2d 1099, 1101-1103, 1106 (5th Cir. 1985); *Estran* v. *Heckler*, 745 F.2d 340, 341-342 (5th Cir. 1984); *Flynn* v. *Heckler*, 768 F.2d 1273, 1274-1275 (11th Cir. 1985); *Brady* v. *Heckler*, 724 F.2d 914, 918-920 (11th Cir. 1984). See also *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984). This circuit conflict warrants resolution by this Court.[16] The widespread litigation on the validity of the severity regulation

[15] District courts in two class actions in the Third Circuit have read *Baeder* broadly to bar the use of *any* severity step, even when it is limited to the denial of claims of individuals who have only minimal impairments. *Wilson* v. *Heckler*, No. 83-3771 (D.N.J. Oct. 9, Nov. 14, 1985), appeal pending, No. 85-5814 (3d Cir.); *Bailey* v. *Heckler*, No. 83-1797 (M.D. Pa. Dec. 3, 1985), appeal pending, No. 86-5038 (3d Cir.).

[16] The First Circuit recently heard oral argument is a case brought by an individual claimant that presents the question of the validity of the severity regulation. *Munoz* v. *Secretary of HHS*, No. 85-1728 (argued Feb. 6, 1986). The question of the validity of the regulation also is pending before the First, Second and Eighth Circuits on appeals from district court decisions invalidating the regulation in

has caused substantial disruption in the administration of the Social Security disability program, and it threatens even greater disruption in light of orders in a number of class actions requiring the reopening of past claims that were denied in reliance on the regulation. See notes 15 & 16, *supra*.

The question of the validity of the severity regulation is of broad practical significance in another respect as well. As we have explained (see pages 17, 19, *supra*), the Secretary and Congress have concluded that requirements of administrative flexibility and efficiency justify a preliminary screening of claimants at step 2 of the sequential evaluation process in order to determine whether their impairments are sufficently minimal to render it unnecessary for the state agency or the ALJ to undertake a full vocational evaluation of the claimant, including a specific consideration of his age, education, and work experience. Such administrative measures are essential in a benefits program of this magnitude, and Congress has expressly vested the Secretary with authority to implement them. See 42 U.S.C. 405(a); *Heckler* v. *Campbell*, 461 U.S. at 461 n.2 ("The need for efficiency is self-evident.").

Moreover, the procedure for assessing the severity of impairments is not entirely divorced from vocational considerations, as the court of appeals seemed to believe (App., *infra*, 9a), because the severity of an impairment must be gauged in terms of its impact on the claimant's ability to perform basic work-related functions. Nor is the procedure unfair to the claimant. Step 2 is designed to screen out those claimants whose impairment reasonably

state-wide class actions. See *McDonald* v. *Heckler*, No. 84-2190-G (D. Mass. Dec. 19, 1985), appeal pending (1st Cir.); *Dixon* v. *Heckler*, 589 F. Supp. 1494 (S.D.N.Y. 1984), appeal pending, No. 84-6288 (2d Cir.); *Campbell* v. *Heckler*, No. C-84-2085 (N.D. Iowa Oct. 21, Nov. 27, 1985), appeal pending, No. 86-1090NI (8th Cir.).

may be presumed not to preclude substantial gainful activity *irrespective* of their age, education, and work experience, and who therefore would be found not to be disabled at subsequent steps of the sequential evaluation process in any event. The court of appeals failed to appreciate these considerations. Its decision, which invalidates a regulation that is applied on a nationwide basis to scores of thousands of disability claims each month, plainly warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

FEBRUARY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-4432

D.C. No. CV 82-953M

JANET J. YUCKERT, PLAINTIFF-APPELLANT,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE.

Argued and Submitted
September 3, 1985—Seattle, Washington

Filed October 24, 1985

Amended January 7, 1986

Before: Eugene A. Wright, Sr. Circuit Judge,
Harry Pregerson and Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Alarcon

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, Chief District Judge, Presiding

OPINION

ALARCON, Circuit Judge:

The Secretary of Health and Human Services denied Janet Yuckert's application for social security disability benefits on the ground that she did not suffer from a "severe impairment" within the meaning of 20 C.F.R. §§ 404.1520(c) and 404.1521 (1985). The district court

affirmed. Yuckert now challenges the validity of the severity regulation, 20 C.F.R. § 404.1520(c) (1985), as inconsistent with the Social Security Act. She argues that the regulation improperly permits the Secretary to find a claimant not disabled based solely on medical evidence, *see id.*, whereas the statute requires the Secretary additionally to consider the claimant's age, education, work experience, and ability to do her past work, *see* 42 U.S.C. § 423(d)(2)(A). Yuckert alternatively contends that substantial evidence does not support the Secretary's decision and that the Administrative Law Judge (ALJ) committed legal error by failing to give proper weight to the opinions of her treating physicians or to give proper reason for rejecting their opinions and the testimony of her vocational rehabilitation counselor. We find the Secretary's "severity" regulation invalid and reverse.

I

BACKGROUND AND FACTS

In October 1980, Yuckert applied for disability benefits under Title II of the Social Security Act. She alleged that she had been disabled since October 1979 as a result of dizziness, headaches, vision and equilibrium problems, and flat feet. After the denial of her application both initially and upon reconsideration. Yuckert requested a hearing before an ALJ.

At the time of her hearing, Yuckert was forty-five years old. She had a high school education, had completed some college classes, and was enrolled part-time in a computer programming training program. She worked as a travel agent from 1963 to 1977, and sporadically as a licensed real estate broker during 1978 and 1979, when she allegedly began suffering attacks of a debilitating illness.

Yuckert testified that she had been unable to work as a result of her illness because she has problems focusing and refocusing her eyes, can see only word at a time, is congested, lack stamina, has headaches, and must rest her eyes every thirty minutes while reading. Her dizziness and equibrium problems limit her ability to walk or drive: she walks cautiously, staying close to walls or counters, and although she drives 80 miles a week, she uses back and side roads and drives very slowly. She requires an excessive amount of sleep, usually taking two or more naps a day. She attends school, but only on a part-time basis.

Both of Yuckert's treating physicians concluded that she was disabled. Dr. Fretwall, an allergist, diagnosed Yuckert's problems as a syndrome of middle ear congestion. Dr. Wong, an otologist, diagnosed spontaneous nystagmus going to the left side and bilateral labyrinthine dysfunction. Both doctors noted that Yuckert's problems were not controlled by medication.

Finally, a vocational rehabilitation counselor, Mr. Mott, testified that Yuckert was incapable of returning to her past work and that she probably could not performing ony other job until her condition improved. Mott had administered a battery of vocational tests to Yuckert; she found that the results confirmed some of Yuckert's symptoms, particularly her vision problems.

The ALJ evaluated the foregoing evidence and Yuckert's claim under the Secretary's disability evaluation regulation, 20 C.F.R. § 404.1520 (1985). That regulation provides a five-step sequential procedure for determining disability, and allows the Secretary to find a claimant "not disabled" without reference to the vocational factor enumerated in the statute, 42 U.S.C. § 423(d)(2)(A). Here, the ALJ found Yuckert not disabled at step two of the procedure when he found that she did not suffer from a severe impairment that significantly limited her ability to perform basic work-related activities. *See* 20 C.F.R.

§ 404.1520(c) (1985). The ALJ thus did not consider whether Yuckert could do her past work or whether she could do any other work, considering her age, education, and work experience.

The Appeals Council denied Yuckert's request for review, and the ALJ's decison became the final decision of the Secretary. Yuckert sought review in the district court. The magistrate assigned to her case determined that substantial evidence supported the determination that she did not have a severe impairment. The district court adopted the magistrate's opinion and affirmed the Secretary's decision. Yuckert timely appeals.

II

DISCUSSION

Yuckert contends that the "severity" regulation, 20 C.F.R. § 404.1520(c) (1985), is invalid because it conflicts with the language of the Social Security Act, 42 U.S.C. § 423(d)(2)(A), by permitting the Secretary to find a claimant not disabled based solely on medical evidence, without regard to vocational factors, such as the claimant's age, education, work experience, and ability to perform past work. Yuckert raises this issue for the first time on appeal. As a preliminary matter, we consider the Secretary's contention that Yuckert's failure to challenge the regulation below precludes her from raising the issue here.

Generally, we will not consider an argument on appeal if the parties failed to raise it below. *Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984); *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp.*, 711 F.2d 902, 905 (9th Cir. 1983). Nevertheless, we recognize an exception to this rule where the issue on

appeal is purely one of law that is both central to the case and important to the public. *Abex Corp.*, 748 F.2d at 516; *In re Sells*, 719 F.2d 985, 990 (9th Cir. 1983). Here, our consideration of the issue will not require the parties to develop new facts; moreover, the validity of the severity regulation presents a significant question of general impact. *See In re Howell*, 731 F.2d 624, 627 (9th Cir.), *cert. denied*, 105 S.Ct. 330 (1984). Thus, we exercise our discretion to consider the issue in spite of Yuckert's failure to raise it in the district court. *See Chico v. Schweiker*, 710 F.2d 947, 952 (2d Cir. 1983).

A. *The Validity of the Regulation*

The Social Security Act provides that certain individuals who are "under a disability" shall receive disability benefits. 42 U.S.C. § 423(a)(1)(D).[1] The Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Act further provides that a claimant will be found disabled only if his impairment(s) "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . ." 42 U.S.C. § 423(d)(2)(A). Thus, on its face, the statute contemplates that the Secretary will consider both medical and vocational factors in awarding benefits. *See Delgado v. Heckler*, 722 F.2d 570, 572-573 (9th Cir. 1983) (discussing 42 U.S.C. §§ 1382c(a)(3)(A) and (B), which contain definitions of disability identical to 42 U.S.C. §§ 423(d)(1)(A) and (d)(2)(A)).

---

[1] The Act's requirements concerning insured status and retirement age are not at issue here. *See* 42 U.S.C. § 423(a)(1).

Nevertheless, in 1978, the Secretary promulgated a regulation pursuant to her rulemaking authority under 42 U.S.C. § 405(a) which permits her to determine disability without reference to the vocational factors set forth in 42 U.S.C. § 423(d)(1)(A). *See* 20 C.F.R. § 404.1520(c) (1985) (original version at 20 C.F.R. § 404.1503 (1979)).[2] Under this regulation, the ALJ follows a five-step sequential analysis for evaluating disability. *Id.; Key v. Heckler,* 754 F.2d 1545, 1548 (9th Cir. 1985). If the ALJ finds the claimant not disabled at any step in the evaluation, he does not consider the remaining steps. 20 C.F.R. § 404.1520(a) (1985); *Stone v. Heckler,* 752 F.2d 1099, 1100 (5th Cir. 1985).

The first step requires the ALJ to determine whether the claimant is currently working. 20 C.F.R. § 404.1520(b) (1985). If the claimant is working, the ALJ must find her not disabled. *Id.* If the claimant is not working, however, the second step requires the ALJ to determine whether the claimant suffers a severe impairment. 20 C.F.R. § 404.1520(c) (1985). The regulations define a severe impairment as one that significantly limits the claimant's "ability to do basic work activities." 20 C.F.R. § 404.1521(a) (1985). Basic work activities mean "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b) (1985).[3] The ALJ must evaluate the

[2] Neither the 1980 amendment nor the 1985 amendment to the regulation alters our substantive analysis.

[3] The regulation gives examples of such activities, including:

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling.
(2) Capacities for seeing, hearing, and speaking;
(3) Understanding, carrying out, and remembering simple instructions;
(4) Use of judgment;
(5) Responding appropriately to supervision, co-workers and usual work situations; and
(6) Dealing with changes in a routine work setting.

20 C.F.R. § 404.1521(b) (1985).

severity of an impairment without reference to vocational factors. 20 C.F.R § 404.1520(c) (1985).[4] Only if the ALJ finds the claimant's impairment(s) severe does he proceed to the next three steps of the sequential analysis, under which he is required to consider the claimant's age, education, work experience, and ability to perform past work. *See* 20 C.F.R. § 404.1520(d)-(f) (1985).[5]

The Secretary contends that the second step of this sequential analysis is valid because it promotes efficiency without violating the provisions of the Social Security Act. She specifically argues that: (1) the regulation is entitled to great deference because it was properly promulgated pursuant to her authority under 42 U.S.C. § 405(a); (2) requiring the ALJ to determine whether the claimant's impairment is severe before considering vocational factors is consistent with the express language of the Act; and (3) the legislative history of the Act, in particular Congress'

[4] The second step, here challenged, provides in full:

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

20 C.F.R. § 404.1520(c) (1985).

[5] Under the third step, the ALJ considers whether the impairment equals one of the listed impairments found in Appendix 1 of the regulations. 20 C.F.R. § 404.1520(d) (1985). If the impairment is listed, the ALJ must find the claimant disabled. *Id.* If the impairment is not listed, however, the fourth step requires him to ascertain whether the claimant can do past relevant work. 20 C.F.R. § 404.1520(e) (1985). Finally, the fifth step, reached only if the claimant cannot perform past work, dictates that the ALJ evaluate whether the claimant can do any other work, given her age, education, and work experience. 20 C.F.R. § 404.1520(f) (1985).

failure to eliminate the "severity regulation" in the 1984 Amendment, supports her position with respect to the regulation.

We agree with the Secretary that we must accord deference to her interpretation of the Act. *Key v. Heckler*, 754 F.2d 1545, 1552 (9th Cir. 1985); *see Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *Batterton v. Francis*, 432 U.S. 416, 426 (1977). Congress has delegated to the Secretary broad power "to prescribe standards for applying certain section of the [Social Security] Act." *Gray Panthers*, 453 U.S. at 43; 42 U.S.C. § 405(a). Nevertheless, the Secretary's power is not unlimited; the regulations she enacts must be consistent with the provisions of the Act, 42 U.S.C. § 405(a), and "cannot supersede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Thus, we will declare the regulation invalid if we find that the Secretary exceeded her statutory authority or if the regulation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Key*, 754 F.2d at 1552; *see Heckler v. Campbell*, 461 U.S. at 466; *Batterton v. Francis*, 432 U.S. at 426.

This circuit has previously noted the apparent "lack of symmetry" between the Secretary's severity regulation and the provisions of the Social Security Act. *Key v. Heckler*, 754 F.2d 1545, 1552 (9th Cir. 1985); *Delgado v. Heckler*, 722 F.2d 570, 574 (9th Cir. 1983). Although we have previously declined to rule on the validity of the sequential procedure, we now find, along with the Third and Seventh Circuits, that the regulation violates the Act because it does not permit the individualized assessment of disability required by the Act.[6] *See Johnson v. Heckler, 769 F.2d*

[6] Several circuits have upheld the severity regulations by construing the threshold severity showing as a "de minimis" requirement. *See, e.g., Farris v. Secretary of Health and Human Services*, No. 84-5808, slip op. at 8 (6th Cir. September 18,1985); *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984); *Evans v. Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984) (per curiam); *Chico v. Schweiker*, 710 F.2d 947, 954-55 & n.10 (2d Cir. 1983).

The government has submitted as supplemental authority a new Social Security Ruling which attempts to clarify policy on step two of the sequential process. The ruling was signed September 17 and has not yet been published. We note, however, that it adopts the "slight abnormality" or "de minimis" interpretation taken by at least five of the circuits. We express no view as to the validity of the new ruling because it is unpublished and because we hold that the regulation it interprets is inconsistent with the Social Security Act.

1202, 1210-13 (7th Cir. 1985); *Baeder v. Heckler*, 768 F.2d 547, 551-53 (3d Cir. 1985); *Dixon v. Heckler*, 589 F.Supp. 1494 1502-06 (S.D.N.Y. 1984). *See also Heckler v. Campbell*, 461 U.S. at 467 (discussing the statutory scheme for individual determinations).

First, as we have noted, the regulation, on its face, conflicts with the language of the statute that requires the Secretary, in determining disability, to consider factors such as age, education, work experience, and ability to do past work. 42 U.S.C. § 423(d)(2)(A). *See Delgado*, 722 F.2d at 574; *Johnson*, 769 F.2d at 1212; *Baeder*, 768 F.2d at 551. We find the Secretary's argument that the regulation is not inconsistent with this language or the statutory purpose belied by the express statutory requirement that both medical and vocational factors be considered in determining disability.

Second, we reject the Secretary's contention that the legislative history of the Act, particularly the 1984 Amendment, supports the sequential evaluation process. Although Congress apparently considered the severity regulation when enacting the 1984 Amendment, we agree with the Seventh Circuit that Congress did not endorse the Secretary's application of the regulation. *See Johnson*, 769 F.2d at 1211-12. Rather Congress was "concerned" that the Secretary was not "using criteria that clearly reflect the

intent of Congress that all those who are unable to work receive benefits." H.R. Rep. No. 618, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3038, 3044-45. Although failing to eliminate the "severe impairment" requirement in the regulation, Congress urges the Secretary to revise her criteria "to reflect the real impact of impairments on the ability to work." *Id.* at 3045. *See also Johnson,* 769 F.2d at 1211-12 (containing a fuller discussion of the legislative history). The legislative history does not suggest that Congress intended to permit findings of non-disability based on medical factors alone. *Baeder,* 768 F.2d at 551-52.[7]

Third, the regulation ignores the long-established precedent of this and other circuits that disability determinations be made according to a two-step process, with the claimant first showing an inability to perform past revelant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work. *See, e.g., Valencia v. Heckler,* 751 F.2d 1082, 1086 (9th Cir. 1985); *Francis v. Heckler,* 749 F.2d 1562, 1564 (11th Cir. 1985); *Channel v. Heckler,* 747 F.2d 577, 579 (10th Cir. 1984) (per curiam); *Whitney v. Schweiker,* 695 F.2d 784, 786 (7th Cir. 1982); *Hall v. Secretary of Health, Education & Welfare,* 602 F.2d 1372, 1375 (9th Cir. 1979).[8] Because the severity regulation ignores vocational

[7] The absence of support for the Secretary's position in either the statute or the legislative history is fatal to her claim that the severity regulation promotes efficiency. As the Seventh Circuit correctly concluded: "[E]fficiency arguments provide absolutely no basis for the Secretary to violate Congressional mandates to implement properly the disability benefits program of this nation." *Johnson v. Heckler,* 769 F.2d at 1213.

[8] Indeed, the Secretary has issued a ruling, binding on all Social Security Administration personnel, that specifically states that disability benefits may be denied "even though [the impairment] may prevent the individual from doing work that the individual has done in the past." Social Security Ruling 82-56. In another ruling, the

factors where a claimant's impairment is found non-severe, the regulation conflicts with this precedent and thus improperly denies benefits to a claimant who has made a prima facie showing of disability. *See Johnson,* 769 F.2d at 1210; *Baeder,* 768 F.2d at 553.[9]

In light of our legal conclusions and considering the specific facts of Yuckert's case, we hold that the severity regulation, 20 C.F.R. § 404.1520(c) (1985), is inconsistent with the Social Security Act and, therefore, is invalid.

B. *Substantial Evidence and Legal Error*

Because we find that the ALJ based his decision on an invalid regulation, we need not decide whether substantial evidence supports the Secretary's finding of no severe impairment. Moreover, because the ALJ will have to reconsider the evidence without regard to the severity regulation and issue a new opinion, we need not determine whether he gave proper weight to the opinions of Yuckert's treating physicians or whether he gave proper reasons for rejecting their opinions and the testimony of her vocational rehabilitation counselor.

CONCLUSION

We hold that the "severity regulation," 20 C.F.R. § 404.1520(c) (1985), is inconsistent with the provisions of the Social Security Act and is therefore invalid. Accordingly, we reverse the decision of the district court and

Secretary established a list of impairments that will be considered per se non-severe under step two of the severity regulation. Social Security Ruling 82-55.

[9] Interestingly, the Third Circuit in *Baeder* notes that the Secretary denied benefits to 40.3 percent of disability applicants without any evaluation of their age, education, or past work experience. *Baeder,* 768 F.2d at 552.

remand with instructions that the Secretary reevaluate Yuckert's claim without reference to the severity regulation, 20 C.F.R. § 404.1520(c) (1985).

REVERSED AND REMANDED.

APPENDIX B

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 84-4432

CV 82-953M

JANET J. YUCKERT, PLAINTIFF-APPELLANT,

v.

MARGARET M. HECKLER, DEFENDANT-APPELLEE.

APPEAL from the United States District Court for the

_____ District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

WESTERN District of WASHINGTON (SEATTLE) ____

_____

_____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is REVERSED & REMANDED.

Filed and entered OCTOBER 24, 1985

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-953M

JANET J. YUCKERT, PLAINTIFF,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

The Court has reviewed the entire record, including the administrative record, the memoranda of the parties, and the Report and Recommendation of United States Magistrate John L. Weinberg. It is therefore ORDERED:

(1) The Court adopts the Report and Recommendation;
(2) The Court affirms the decision of the Secretary of Health and Human Services; and
(3) The Clerk shall direct copies of this order to all counsel and to Magistrate Weinberg.

Dated this 24th day of Oct. 1984.

/s/ WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C82-953M

JANET J. YUCKERT, PLAINTIFF,

v.

MARGARET M. HECKLER,* SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

BASIC DATA

Type of benefits sought:
(x) Disability Insurance
(x) Supplemental Security Income – Disability
( ) Other:

Plaintiff's:
Sex: Female
Age (as of hearing before ALJ): 45

Principal Disability(s) Alleged by Plaintiff:
(1) Bilateral labyrinthine dysfunction, resulting in dizziness, vision impairment (inability to focus), and severe headaches.
(2) Feet – bad arches.

Disability Allegedly Began: January 2, 1980.

Principal Previous Work Experience (with dates or duration):
(1) Travel Agent, 1963-1977
(2) Real Estate Sales, 9/78-9/79 (with interruptions for illness)

---

* Substitution of defendant, pursuant to F.R.Civ. P. 25(d)

(3) Part-time job with United Parcel Service, one week in 11/79

Plaintiff Last Worked (Date): 11/79

Education Level Achieved by Plaintiff: High school graduate, various college courses

Is there any issue as to whether plaintiff has sufficient quarters of work to be eligible for benefits? No.

PROCEDURAL HISTORY – ADMINISTRATIVE

Before ALJ:

Date of Hearing (if any): 9/9/81
Date of Decision : 12/22/81
Appears in record at : R. 21-25
Summary of Decision : Plaintiff does not have a "severe impairment." No objective medical findings substantiate the symptoms of which she complains. Her successful participation in college computer courses reinforces this conclusion.

Before Appeals Council:

Date of Decision : 6/25/82
Appears in record at : R. 4-5
Summary of Decision : Affirmed decision of ALJ. Difficulty in small detailed parts dexterity does not preclude any substantial gainful activity.

PROCEDURAL HISTORY – THIS COURT

Jurisdiction based upon : (x) 42 U.S.C. § 405(g)
( ) Other:

Brief of Merits submitted by (x) Plaintiff (x) Secretary.
Oral Argument (x) Not requested ( ) Conducted on

RECOMMENDATION OF UNITED STATES MAGISTRATE

Affirm the ALJ's determination that plaintiff has not established the existence of a "severe impairment."

DISCUSSION

In determining plaintiff's disability claim, the Secretary, and the court, are required to apply the sequential analysis described in 20 C.F.R. § 404.1520.

Plaintiff is not working, and has not worked since November, 1979. School attendance is generally not considered to be "substantial gainful activity." § 404.1572(c).

It is plaintiff's burden, however, to establish that she has a "severe impairment" i.e., an impairment which significantly limits her physical or mental ability to do basic work activities. § 404.1520(c).

The regulations define "basic work activities" as:

> ". . . the abilities and aptitudes necessary to do most jobs. Examples of these include –
>
> (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
>
> (2) Capacities for seeing, hearing, and speaking;
>
> (3) Understanding, carrying out, and remembering simple instructions;
>
> (4) Use of judgment;
>
> (5) Responding appropriately to supervision, co-workers and usual work situations; and
>
> (6) Dealing with changes in a routine work setting."

§ 404.1521(b).

In finding that plaintiff did not suffer from a severe impairment, the Secretary in essence found that her impairment did not significantly limit her physical and mental abilities to do "basic work activities." This court must determine whether there is substantial evidence to support that conclusion.

The evidence is conflicting on this point. Perhaps the strongest support for the Secretary's conclusion is that plaintiff was successfully participating in a course of study

in computer programming at a community college. This course required her to spend three hours per day in class, five days per week. Each day after concluding her classes and a nap, she devotes six to eight hours of homework, ending about midnight. (R. 48-9)

Plaintiff's success in this program is substantial evidence of her ability to perform basic work activities. This conclusion is reinforced by the observations of her counsellor at the Department of Vocational Rehabilitaton of the State of Washington. "DVR" suggested and sponsored the community college course of study for plaintiff. While thoroughly familiar with plaintiff's impairments, her counsellor expressed the view that, once trained, she will have little problem in obtaining employment.

> "DVR thinks that the training is appropriate for Janet in all areas: 1) capabilities, 2) interests and most importantly, 3) within her medical limitations." (R 192-3).

While this determination by another agency is by no means conclusive, it is evidence supporting the Secretary's consistent conclusion.

The record also includes a "functional assessment" apparently completed and signed by a Dr. Joseph Robin (R. 188). Dr. Robin concluded there were very few limitations upon plaintiff's ability to perform basic work activities. It is not clear from the record, however, who Dr. Robin is, whether he ever examined plaintiff, and what was the basis for his conclusions.

On the other hand, Dr. Wong, plaintiff's treating physician, concluded that her impairment was incapacitating, and that she would be disabled for an indefinite period of time. (R. 160). Dr. Janet Mott, a vocational expert, administered a battery of tests to plaintiff. Ms. Mott concluded plaintiff would not be employable until her condition improved. (R. 72-80).

The record therefore contains conflicting evidence as to whether plaintiff suffers from a severe impairment. It is the function of the Secretary, however, not of this court, to weigh that evidence and to resolve the issue. Because there is substantial evidence in support of the Secretary's conclusion, this court is required to affirm her determination.

A proposed order accompanies this Report and Recommendation.

DATED this 9 day of May, 1984.

/s/ JOHN L. WEINBERG

John L. Weinberg
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C82-953M

JANET J. YUCKERT, PLAINTIFF,

v.

MARGARET M. HECKLER, SECY.,
HEALTH & HUMAN SERVICES, DEFENDANT.

JUDGMENT

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED, that the decision of the Secretary is hereby affirmed.

DATED this 25th day of October, 1984.

Deputy United States District Clerk

APPENDIX F

DEPARTMENT OF HEALTH & HUMAN SERVICES — Social Security Administration

---

Refer to:
SCC
531-34-8353

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

June 25, 1982

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Janet L. Yuckert
13725 56th Ave., S., 1207
Seattle, WA 98168

Dear Ms. Yuckert:

Re: Your Claims for Disability Insurance Benefits and Supplemental Security Income

The request for review of the hearing decision in your case has been considered.

Sections 404.970 and 416.1470 of Social Security Administration Regulations Nos. 4 and 16 (20 CFR 404.970 and 416.1470) provide that the Appeals Council will grant a request for review of a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence or (4) there is a broad policy or procedural issue which may affect the general public interest. These sections also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and

review will be granted where the Appeals Council finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, your request is denied and the hearing decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council has considered the multiple psychological testing data submitted by your representative in-Ex. AC-2 conjunction with your request for review. The various testing devices were utilized by the vocational expert in her evaluation of your vocational capabilities. The over-all results of all the testing indicated an average range of intellectual abilities, with no profound irregularities and the majority of skills still fully intact. Only the finger dexterity test administered showed a degree of difficulty. The Appeals Council notes in that regard that the limitations potentially imposed by the difficulty you might experience in small detailed parts dexterity does not indicate an inability to perform any substantial gainful activity. The weight of the entire evidence of record in your case, including the new evidence, supports the administrative law judge's finding that you do not have any significant impairment of work-related abilities.

The Appeals Council has also carefully considered each of the contentions raised by your representative in his brief of April 5, pg. 7-17 1982. The Appeals Council believes that the administrative law judge's decision was based on substantial evidence in the record, and that the administrative law judge did consider all the evidence of record in reaching his decision. The Appeals Council sees no reason to grant your request for review.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C.(g) and 1383(c)(3)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, your complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice.

Sincerely yours,

Lawrence Weiner
Member, Appeals Council

cc:
James A. Douglas, Esq.
Seattle, WA 98104

HO, Seattle, WA (ALJ Sode)

APPENDIX G

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

In the case of Janet L. Yuckert	Claim for Period of Disability, Disability Insurance Benefits and Supplemental Security Income
(Claimant)	
(Wage Earner) (Leave blank if same as above)	531-34-8353 (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing.

ISSUES

The general issues before the administrative law judge are whether the claimant is entitled to a period of disability and to disability insurance benefits under sections 216(i) and 233, respectively, of the Social Security Act; and whether the claimant is disabled under section 1614(a)(3) of the Social Security Act. The specific issues are whether the claimant was under a "disability" as defined in the Act and, if so, when such "disability" commenced and the

duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

LAW AND REGULATIONS

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and section 223 of the Act provides for the payment of disability insurance benefits where the requirements specified therein are met.

Section 223(d)(1) and 1614(a)(3)(A) of the Social Security Act (42 U.S.C. 423(d)(1) and 42 U.S.C. 1382c(a)(3)(A)) define disability as the inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . ."

Sections 223(d)(3) and 1614(a)(3)(C) of the Act define a "physical or mental impairment" as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

Sections 404.1520(c) and 416.920(c)) of Social Security Administration Regulations Nos. 4 and 16, respectively, (20 CFR 404.1520(c) and 416.920(c)) provide that if an individual does not have any impairments which significant limit physical or mental ability to do basic work activities, a finding shall be made that the individual does not have a severe impairment and, therefore, is not disabled regardless of age, education, and work experience.

Regulations 404.1521(b) and 416.921(b) (20 CFR 404.1521(b) and 416.921(b)) define basic work activities to mean the abilities and aptitudes necessary to do most jobs. Examples of these abilities and aptitudes include physical

functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; capacities for seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgement; responding appropriately to supervision, co-workers, and usual work situations; and dealing with changes in a routine work setting.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decision.

EVALUATION OF THE EVIDENCE

This 45 year old travel agent with a high school education, 2 years of business college and real estate training alleges she has been unable to work since October 9, 1979, due to a combination of impairments including dizziness, vision loss and foot problems.

Her duties included writing airline tickets, planning travel schedules, making travel facilities reports and she used office mackines in performing these duties for 15 years.

The objective diagnostic clinical findings are imprecise in this case. Dr. Marsha Fretwell of the allergy clinic at the Harborview Medical Center diagnosed her problems as non-specific congestion of the nasal and middle ear mucous membranes.

Otologist, Dr. Matthew L. Wong, diagnosed her problems of dizziness and focusing as most likely labyrinthine in origin and bilateral. She has a spontaneous nyatagmus going to the left side. X-rays of the internal auditory canals, electronystagmogram and brain stem evoked

response and audiometry were normal. She was extensively worked up by the Public Health Hospital and they did not feel she had multiple sclerosis. (Exhibit 23)

Multiple tests given, though claimant failed to divulge objective clinical findings of abnormalities that support the claimant's severity of the stated impairments for 12 continuous months. X-rays of her internal auditory canal revealed no abnormality. Her EKG was normal. Skull X-rays were normal and a spinal puncture was not informative. (Exhibits 17 and 19)

The claimant testified she has a tendency to fall to the right, but catches herself and has never fallen. She can not stand more than three quarters of an hour at one time. She drives her car 80 to 90 miles a week.

In January 1981, the claimant commenced a 2 year community college training plan for computer programming. She successfully completed 11 credit hours that quarter and is currently continuing that course on a half day basis.

Vocational Expert, Janet Mott, testified that claimant is within the average range of intelligence, has a 12th grade educational skills and an above average memory. The claimant has poor eye/hand coordination, poor concentration and is operating under a great deal of stress.

Although Dr. Mott concluded the claimant's medical condition would preclude her from working competitevely, the objective clinical diagnostic findings of record do not support the conclusion that the claimant is "disabled". Symptoms alone do not establish there is a physical or mental impairment. Medical signs of findings should be accompanied by a medical condition that could reasonably be expected to produce the symptoms.

The claimant failed to produce substantial medical evidence to support a finding that her physical abilities to do basic work activities were significantly limited. Although she alleges that her activities have been somewhat reduced she is successfully completing a

relatively difficult higher education course learning the language of computers. This achievement, coupled with generally negative clinical findings, her activities, e.g., driving her car, visiting with friends, all indicate to the undersigned that claimant's vision and balance problems are not severely physically restrictive as defined by Section 404.1521, Regulations No. 4 of 20 CFR.

This is not to say that the claimant is free from episodes of dizziness, or vision problems, but that the greater weight of the evidence fails to establish she suffers from a severe condition, and in accordance with the Social Security Act and Regulations promulgated by the secretary may not be considered to be "disabled." Claimant appears to be overemphasizing the effect of her impairments on her ability to perform basic functions.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant meet the special earnings requirements through the date of this decision.
2. Claimant alleges labyrinth with occasional episodes of dizziness and loss of focus; and flat feet.
3. Claimant is exaggerating the effects of her impairments.
4. The claimant's medical condition does not significantly limit her ability to perform basic work-related functions, e.g., real estate salesperson.
5. Claimant does not have any impairment or impairments which significantly limit her ability to perform basic work-related functions; therefore she does not have a severe impairment.
6. Since the claimant does not have a severe impairment, she may not be considered "disabled" within the meaning of the Social Security Act, as amended.

DECISION

It is the decision of the Administrative Law Judge that based on her applications of October 23, 1980, the claimant is not entitled to a period of disability or to disability insurance benefits under sections 216(i) and 223, or to Supplemental Security Income, under Section 1611, respectively, of the Social Security Act, as amended.

/s/ WILLIAM T. SODE

William T. Sode
Administrative Law Judge

DATED December 22, 1981

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 223(d)(1)(A) and (2)(A) of the Social Security Act, as codified at 42 U.S.C. 423(d)(1)(A) and (2)(A), provides:

(d) "Disability" defined

(1) The term "disability" means–

(A) inability to engage in any substantial gainful acitivity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)–

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

2. Section 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A) and (B), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. Section 223(d)(2)(C) of the Social Security Act, as added by Section 4(a)(1) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800, provides:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the

individual's impairments without regard to whether any such impairment if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

4. Section 1614 (a)(3)(G) of the Social Security Act, as added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800, provides:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

5. 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education,

and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activites.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

6. 20 C.F.R. 416.920 and 416.921 provide:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education,

and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work, If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can on longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, Mar. 5, 1985]

§ 416.921 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantlv limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

APPENDIX I

SOCIAL SECURITY RULING (SSR) 85-28

(PPS-122) SSR 85-28

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To clarify the policy for determining when a person's impairment(s) may be found "not severe" and, thus, the basis for a finding of "not disabled" in the sequential evaluation of disability, and thereby reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of "not severe" impairments.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520-404.1523 and Regulations No. 16, sections 416.920-416.923.

PERTINENT HISTORY: The basic definition of disability is contained in sections 223(d)(1)(A) and 1614(a)(3)(A) of the Act. Under this definition, an individual must have, as an initial requirement, a "physical or mental impairment," as defined in sections 223(d)(3) and 1614(a)(3)(C), and which is expected either to result in death or to last at least 12 months. The principal requirement regarding impairment severity contained in the basic statutory definition of disability is that the individual's inability to engage in any substantial gainful activity (SGA) be "be reason of" the impairment.

In reporting on the Social Security Amendments of 1954 which first introduced the basic definition of disability into the Act, the Senate Committee on Finance indicated that the definition required that there be a "medically determinable *impairment of serious proportions*," that is,

"of a nature and degree of severity sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work."

In the Social Security Amendments of 1967, Congress introduced into the Act the provision in section 223(d)(2)(A) which sets out a specific requirement respecting impairment severity and which provides for the consideration of vocational factors in determining disability: An individual ". . . shall be determined to be under a disability only if his *physical or mental impairment or impairments are of such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy . . ." (emphasis added). In reporting on these amendments, both the Senate Committee on Finance and the House Committee on Ways and Means reaffirmed the need for some assurance that a finding of disability would be based on a *serious impairment*. The Committees explained that the provisions of the amendment would require, in part, that:

". . . an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments* . . ." (emphasis added).

As in 1954 and 1967, Congress, again, in the Social Security Disability Benefits Reform Act of 1984, made it clear that a denial of disability benefits may be based on medical factors alone. In amending section 223(d)(2) and section 1614(a)(3) of the Act to provide for the evaluation of the impact of multiple impairments throughout the sequential evaluation process, Congress introduced language which affirms the presence of a severity threshold in the adjudicative process:

"In determining whether an individual's physical or mental impairment or impairments are *of a sufficient medical severity that such impairment or impairments could be the basis of eligiblity under this section,* the Secretary shall consider the combined effect of all of the individual's impairments. . . ."

The validity of a disability decision based on medical considerations alone was also recognized in the Conferees' discussion of the amendment (House of Representatives Conference Report 98-1039 to accompany H.R. 3755. September 19, 1984, p. 30) in which it was stated that there was no intention to "either eliminate or impair" the use of the "current sequential evaluation process."

The principle that a denial determination may be made on the basis of medical considerations alone was first reflected in Regulations No. 4, section 404.1502(a), published in 1960. Regulations published in 1978 revised the 1960 statement concerning such determinations by replacing the phrase ". . .the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities . . ." with ". . . The medically determinable impairment in not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

This change in regulatory definition was introduced in the language describing step 2 of the sequential evaluation process which was formalized in regulations effective February 26, 1979. (The 1980 recodification of the Disability Regulations into common sense language reworded the definition of a not severe impairment as follows: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities." 20 C.F.R. 404.1521(a) and 416.921(a). Also see sections 404.1520(c) and 416.920(c).) These changes in regulatory language were *not* intended to alter the levels of severity for a finding of not disabled on

the basis of medical considerations alone. Rather, they were intended only to clarify the circumstances under which such a finding would be justified (*Federal Register*—March 7, 1978, p. 9296-9297; November 28, 1978, p. 55357-55358). Nevertheless, some recent circuit court decisions have taken exception to the threshold of impairment severity applied in the adjudication of subject cases which were denied on the basis of not severe impairment.

As observed by the Congress, the Social Security Administration (SSA), as part of an ongoing review, is reevaluating the application of the not severe impairment policy and will continue to do so. This ruling is part of the ongoing reevaluation and imterprets and clarifies the current policy on not severe impairment, describes the threshold intended, and reflects recent legislation. Also, it is being issued to clarify that SSA's policy is consistent with various court decisions. For example, *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985), and *Estran* v. *Heckler*, 745 F.2d 340 (5th Cir. 1984), stated that "an impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work irrespective of age, education, or work experience." As *Baeder* v. *Heckler*, No. 84-5663 (3rd Cir. July 24, 1985), suggested, the severity regulation is to do no "more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working."

POLICY CLARIFICATION: In determining, for initial entitlement to benefits, whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, ability to do past work, and ability to do other work (in light of the individual's age, education and

work experience) are considered, in that order. See 20 CFR sections 404.1520 and 416.920. In determining continuing entitlement to benefits, the adjudicator, with appropriate consideration of the medical improvement review standard, also follows a sequential evaluation process which includes the "not severe impairment" concept. Fundamental to these processes is the statutory requirement that to be found disabled, an individual must have a medically determinable impairment "of such severity" that it precludes his or her engaging in any substantial gainful work.

As explained in 20 CFR, sections 404.1520, 404.1521, 416.920(c), and 416.921, at the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments "of such severity" as to be the basis of a finding of inability to engage in any SGA. An impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities). Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be not severe would not prevent him or her from engaging in SGA.

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs. Examples of these are walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; seeing, hearing, and speaking; understanding, carrying out, and

remembering simple instructions; use of judgement, responding appropriately to supervision, coworkers, and usual work situations; and dealing with changes in a routine work setting. Thus, these basic work factors are inherent in making a determination that an individual does not have a severe medical impairment.

Although an impairment is not severe if it has no more than a minimal effect on an individual's physical or mental ability(ies) to do basic work activities, the possiblity of several such impairments combining to produce a severe impairment must be considered. Under 20 CFR, section 404.1523 and 416.923, when assessing the severity of whatever impairments an individual may have, the adjudicator must assess the impact of the combination of those impairments on the person's ability to function, rather than assess separately the contribution of each impairment to the restriction of his or her activity as if each impairment existed alone. A claim may be denied at step two only if the evidence shows that the individual's impairments, when considered in combination, are not medically severe, i.e., do not have more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities. If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

Inherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA is not seriously affected. Before this conclusion can be reached, however, an evaluation of the effects of the impairment(s) on the person's ability to do basic work activities must be made. A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities;

thus, an assessment of function is inherent in the medical evaluation process itself. At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. If this assessment shows the individual to have the physical and mental ability(ies) necessary to perform such activities, no evaluation of past work (or of age, education, work experience) is needed. Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.

By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work. If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant work in such instances warrants further evaluation of the individual's ability to do other work considering age, education and work experience.[1]

---

[1] This provision does not conflict with, nor negate, the policy stated in SSR 82-63 concerning special "no recent or relevant work experience" cases. In such cases an individual must be found to have a severe impairment(s) (i.e., one which has more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities) in order to be considered under the special provisions of that Ruling.

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience.

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 491-507/20154

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW Janet J. Yuckert and moves this Court for an Order to permit her to proceed in forma pauperis without payment of fees and costs or security therefore, as provided in 28 U.S.C. §1915, because, as her affidavit indicates, she is unable to pay such costs or give security therefore.

DATED: April 21, 1986.

GIBBS, DOUGLAS, THEILER & DRACHLER

By James A. Douglas
James A. Douglas

25pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, Janet J. Yuckert, being first duly sworn, depose and say that the Secretary of Health and Human Services has petitioned for a writ of certiorari in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; and that I believe I am entitled to redress.

I further swear that the information set forth below relating to my ability to pay the costs of said proceeding is true.

1. I am presently unable to work because of my disability. I last worked in November, 1979. I am unemployed and my sole source of income is loans from my father and mother. The only cash I have on hand or money in a checking account is from this source.

2. My father keeps very close account of the amounts they lend me. He is retired and on a pension; my mother never worked. They expect me and I have agreed to pay them back for the support they are providing if I ever receiv disability benefits or regain my health.

3. Within the past twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

4. I do not own any real estate, stocks, bonds, notes, or other valuable property (excluding ordinary household furnishings and clothing). My car is a 1970 Ford Maverick, the value of which is so low it does not even appear in the Blue Book.

5. No one is dependent upon me for support.

6. I was granted leave to proceed in forma pauperis before both the district court and the circuit court of appeals in this action.

I understand that a false statement or answer to any questions in this statement will subject me to penalties for perjury.

Janet J. Yuckert

SUBSCRIBED AND SWORN to before me this 16 day of April, 1986.

Kim Watts
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

No. 85 - 1409

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT, RESPONDENT

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JAMES A. DOUGLAS, ESQ.
GIBBS, DOUGLAS, THEILER & DRACHLER
1613 Smith Tower
Seattle, WA 98104
(206) 623-0900

No. 85 - 1409

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the "severity step," either as embodied in the Secretary's regulations, 20 C.F.R. §§404.1520(c) and 416.920(c), or as applied by the Secretary, violates the Social Security Act by allowing the Secretary to make summary denials of disability benefits without considering the effect of a claimant's impairments on the ability to perform past or other work.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

STATUTES AND LAWS

RULES AND REGULATIONS

MISCELLANEOUS

I. STATEMENT OF THE CASE

Respondent Janet J. Yuckert respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Ninth Circuit Court of Appeals in this case. The order and judgment of the district court below and the decision of the Ninth Circuit are found in the Appendix attached to the Petition herein.

Ms. Janet J. Yuckert, Respondent, is a former travel agent whose principal impairment is "bilateral, labyrinthine dysfunction," a condition which makes it difficult to focus her eyes or to stand. Brief of Appellant, Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985), petition for cert. filed No. 85-1409 (Feb. 21, 1986), at 3. "She can just see one word at a time," making the use of her eyes a "tremendous strain." Ibid. She suffers dizziness, and "tends to fall" to her right side. Ibid. "She has learned to compensate by holding onto walls, furniture, counters and by staying within reach of something she can grab." Ibid. She suffers "extremely severe" headaches two or three times per week. Ibid. Previously these headaches occurred "all the time." Ibid. Her condition makes her weak and shaky, and she has problems with stamina. Ibid. She also has problems with her feet which aggravate her difficulty standing. Ibid. The dizziness has affected her mental abilities. Id. at 6. She has been unable to continue many of her former activities, and has great difficulty driving, even on a limited basis. Id. at 5. Unable to do her former work, Janet Yuckert has made an "incredible effort" to learn new skills at a community college. Id. at 8. After a class she needs to sleep for several hours and she is able to study only by alternately working and sleeping in 30 minute stretches. Id. at 4.

Ms. Yuckert applied for Social Security and Supplemental Security Income disability benefits on October 30, 1980.[1] The application was denied as "non-severe." This means the denial was made without regard to the effect of her condition on her ability to do her past or other work. Such denials are commonly referred to as having been made at the "severity step."[2]

After exhausting the available administrative remedies, Ms. Yuckert filed a timely appeal with the United States District Court for the Western District of Washington on August 18, 1982 alleging that the Administrative Law Judge's decision failed to give proper weight to the opinion of the treating physician and was not based on substantial evidence. The district court adopted the Magistrate's recommendation and affirmed the Secretary's findings. Pet. App. 14a and 20a. Ms. Yuckert did not challenge the validity of the "non-severe" regulations in the district court.

Ms. Yuckert appealed to the Ninth Circuit Court of Appeals on December 20, 1984. Shortly thereafter she moved for a remand pursuant to the preliminary injunction issued in a circuit-wide class challenge to the validity of "non-severe" denials, Smith v. Heckler, 595 F. Supp. 1173 (E.D.Cal. 1984), appeal pending, No. 85-2178 (9th Cir., argued Oct. 10, 1985). This motion was denied. Ms. Yuckert then moved to stay proceedings in the court of appeals pending a ruling in one of the other challenges to the "severity step" before the court. The Secretary did not oppose the motion for stay and in fact "suggest[ed] that ... argument in [this] case be stayed" giving as one reason the fact that the Smith injunction had been

---

[1] The Social Security Act creates two parallel disability programs. Title II of the Social Security Act provides benefits to disabled workers without regard to financial need. 42 U.S.C. §401 et seq. Title XVI of the Social Security Act creates the Supplemental Security Income program which provides benefits to disabled individuals whose income and resources fall below a specific level. 42 U.S.C. §1381, et seq. The definition of disability, which is the same for both programs, specifically requires that impairments be evaluated in terms of their effect on the claimant's ability to do past or other work. 42 U.S.C. §§423(d)(2)(A) and 1382c(a)(3)(A). (See Heckler v. Campbell, 461 U. S. 458 (1983), for a general description of the Social Security disability program.)

[2] The "severity step" is the second of a series of questions called the "sequential evaluation" used to evaluate disability claims. 20 C.F.R. §§404.1520 and 416.920. As this series of questions is currently structured, no evaluation of the ability to do past or other work is made for claimants whose impairments are found to be "non-severe."

appealed on an expedited basis and was set for oral argument on October 10, 1985. Appellee's Response to Appellant's Motion to Stay Proceedings. The Motion to Stay Proceedings was denied and the court proceeded to consider Ms. Yuckert's appeal. Appellant's brief raised the challenge to the severity regulation for the first time.

The court of appeals reversed and remanded the district court order on October 24, 1985. Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985), petition for cert. filed No. 85-1409 (Feb. 21, 1986). Since there had been no discovery or factual development on the general impact of non-severe denials, the court's analysis was, of necessity, made on solely legal grounds. Specifically, the court found that the severity step "does not permit the individualized assessment of disability required by the [Social Security] Act." Yuckert v. Heckler, 774 F.2d, supra, at 1369. The court relied on Johnson v. Heckler, 769 F.2d 1202, 1210-13 (7th Cir. 1985), reh. den. 776 F.2d 166 (1985) petition for cert. filed No. 85-1442 (Feb. 28, 1986); Baeder v. Heckler, 768 F.2d 547, 531-53 (3d Cir. 1985); Dixon v. Heckler, 589 F.Supp. 1494, 1502-06 (S.D.N.Y. 1984); Delgado v. Heckler, 772 F.2d 570, 574 (9th Cir. 1983); and referred to Heckler v. Campbell, 461 U.S. 458, 467 (1983), for the "statutory scheme for individual determinations." The court rejected the Secretary's argument that the legislative history of the Act endorsed the Secretary's application of the severity regulation. Yuckert v. Heckler, supra, 744 F.2d at 1370.

The court also found that the severity step violated the "long established" precedent of the circuit courts regarding allocation of the burden of proof in disability determinations. Id. at 1370.[3] This allocation requires a claimant to make a prima facie showing of disability by proving an inability to perform past relevant work, after which the burden shifts to the

---

[3] The court cites Valencia v. Heckler, 751 F.2d 1082, 1086 (9th Cir. 1985); Francis v. Heckler, 749 F.2d 1562, 1564 (11th Cir. 1985); Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984) (per curiam); Whitney v. Schweiker, 695 F.2d 784, 786 (7th Cir. 1982); Fall v. Secretary of Health, Education & Welfare, 602 F.2d 1372, 1375 (9th Cir. 1979), and referring to Johnson v. Heckler, supra, 769 F.2d, at 1210, and Baeder v. Heckler, supra, 768 F.2d at 553.

Secretary to show that the claimant retains the capacity to perform other work.

Subsequent to oral argument in the court of appeals but prior to issuance of the court's decision, the Secretary submitted a draft of a "Social Security Ruling" purporting to either clarify or alter the "non-severe" step so as not to violate the requirement of the Social Security Act that impairments be evaluated in light of their effect on the ability to engage in substantial gainful activity.[4] The court declined to rule on the validity of this ruling. Id. at 1369 n.6.

The court of appeals remanded Ms. Yuckert's case to the district court "... with instructions that the Secretary reevaluate Yuckert's claim ...." Id. at 1371. However, remand from the district court to the Secretary for further factual development has been deferred at the request of the Secretary pending the present proceedings.

On February 27, 1986, the Secretary filed the pending Petition for Certiorari.

II. ARGUMENT

A. There Is No Circuit Conflict Warranting Resolution By This Court.

The Ninth Circuit in this case joins every circuit which has considered the issue, as well as numerous district courts, in finding that the Secretary's "non-severe" impairment regulations, policies and practices have violated claimants' right to individualized assessments of their disability claims. These cases hold that the purpose of the disability program, as set forth in the Social Security Act, is to assist people whose medical conditions prevent them from working. The Secretary's severity step, which denies or terminates large numbers of people

---

[4] This draft was later revised and published as Social Security Ruling (SSR) 85-28.

people without consideration of their actual ability to work, therefore makes no sense.[5]

The Petitioner, while acknowledging that the Ninth Circuit is not alone in invalidating the severity step, asserts that the variations in the reasoning of these decisions warrant Supreme Court review. Yet the only real distinction among the decisions is whether the illegality of the severity step is seen as deriving from an invalid regulation[6] or as being an illegal practice which could be remedied by a stricter reading of the regulation.[7] The only practical effect of this distinction is whether the Secretary can reform the severity step only through a new regulation or whether he can use manuals, rulings and other policy channels.

By focusing on the remedies ordered by the courts rather than the substance of the courts' reasoning, the

---

[5] In some years as many as 40% of all disability disallowances were based on the severity step. Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985); and Dixon v. Heckler, 589 F.Supp. 1494, 1503-1504 (S.D.N.Y. 1984), aff'd __ F.2d __ (2d Cir., Mar. 7, 1986), citing Background Material and Data on Major Programs Within the Jurisdiction of the Committee on Ways and Means, W.M.C.P. 98-2, Committee on Ways & Means, United States House of Representatives, 98th Cong., 1st Sess. at 79 (1983). The percentage of claimants whose claims were originally denied or terminated as "not severe" and who were later found to be in fact disabled by an Administrative Law Judge following court-ordered reevaluation has risen as high as 42% for some months. Memorandum from Maury Ross to Joseph E. Maloney (July 15, 1985), included in "Monthly Report" submitted to the court on August 12, 1985 in Smith v. Heckler, 595 F.Supp. 1173 (E.D.Cal. 1984), appeal pending, No. 85-2178 (9th Cir., argued Oct. 10, 1985).

[6] See, e.g., the present case; Smith v. Heckler, 595 F.Supp. 1173 (E.D.Cal. 1984), appeal pending, No. 85-2178 (9th Cir., argued Oct. 10, 1985) (9th Cir. class); Hansen v. Heckler, 783 F.2d 170 (10th Cir. 1986); Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), reh. den. 776 F.2d 166 (1985) petition for cert. filed No. 85-1442 (Feb. 28, 1986) (Illinois class); Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985); and Dixon v. Heckler, supra (New York class); McDonald v. Heckler, 624 F.Supp. 375 (D.Mass. 1985) (Massachusetts class).

[7] See, e.g., Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985); Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984); Evans v. Heckler, 734 F.2d 1012 (4th Cir. 1984); Keith v. Heckler, 732 F.2d 1089 (2d Cir. 1984); Salmi v. Secretary of Health and Human Services, 774 F.2d 685 (6th Cir. 1985). The only Circuit Court of Appeals which has ever even appeared to uphold the severity step is the Sixth. In Gist v. Secretary of Health and Human Services, 736 F.2d 352 (6th Cir. 1984), that court rejected a challenge to the severity step in a one-paragraph statement without the benefit of discovery or in depth analysis. In a more recent opinion, Salmi v. Secretary of Health and Human Services, supra, the Sixth Circuit expanded on Gist to require that the severity regulations be interpreted narrowly, thereby joining the circuits which hold the severity step invalid if not narrowly applied. Salmi, supra, 774 F.2d at 689-692.

Petitioner attempts to establish that circuits which have invalidated only the Secretary's practice, requiring the Secretary to read his regulation more narrowly, are in conflict with those decisions which invalidate the regulation as it is written.[8] Consideration of a few of the cases cited by the Petitioner to support this alleged conflict in fact illustrates the uniformity of the reasoning employed by the courts.

In Baeder, a case which invalidated the regulation, the Third Circuit found that the severity step clearly exceeded a de minimis screening concept and allowed the Secretary virtually unlimited discretion in disability determinations.

> "We believe that section 1520(c) of the regulations does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working. It also allows the Secretary to bypass a full-scale evaluation, which would consider and relate both medical and vocational factors, of an applicant who might actually be entitled to benefits were his age, education and work experience considered."

768 F.2d at 553.

In Stone v. Heckler, 752 F.2d 1099, 1104 (5th Cir. 1985), the Fifth Circuit expressed the same concern regarding discretion used by the Secretary under the aegis of the severity step, but chose to remedy the Secretary's violation of the Act by assuming, on a case-by-case basis, that the Secretary's construction and application of the severity step was invalid.

> "If we read this statute [42 U.S.C. §423(d)(1) and (2)] to authorize the Secretary to deny 'disability' to a claimant suffering a physically or mentally disabling impairment, and for that reason unable to engage in substantial gainful work, whenever the Secretary is not satisfied with the 'severity' of the impairment, we would be holding contrary to the expressed Congressional purpose and rewriting the statute to leave the determination of disability solely to the Secretary's discretion about severe impairments. We can find no justification in the statutory language, nor in the history of this legislation, for the Secretary's position."

The Court added:

---

[8] Nearly all of the courts which have considered the validity of the severity step have also held that the severity regulation conflicts with the longstanding rules that a claimant must be afforded the opportunity to establish a prima facie case of disability by showing inability to do past work. See, e.g., the present case; Johnson v. Heckler, supra; Dixon v. Heckler, supra, 589 F.Supp. at 1506. Petitioner does not address this issue.

> "The Secretary does not have the authority to construe the severity regulation so as to deny benefits to individuals who are disabled within the meaning of section 423(d). This circuit in Estran, Davis, and Martin has stated the proper construction of the term 'severe impairment' found in the severity regulation, and the Secretary's construction would render the regulation invalid."

752 F.2d at 1105 (emphasis added).

The Seventh Circuit's statutory analysis in Johnson, supra, 769 F.2d at 1210-11, pinpoints the flaw in the severity step as the Secretary's discretion to preclude claimants from proving their prima facie case.

> "The Act provides that an individual will be found disabled when his 'physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work...' 42 U.S.C. §§423(d)(2) and 1382c(a)(3)(B) (emphasis added). The Supreme court has recognized that 'disability hearings will be individualized determinations.' Heckler v. Campbell, 461 U.S. 458, 467 (1983). Step two, by contrast, permits the Secretary to label a claimant as not disabled, even though his impairments in fact prevent him from doing his past work...."

(Emphasis in original.)

Finally, Hansen v. Heckler, supra, 783 F.2d at 176, specifically recognized that the issue was one of remedy.

> "We must therefore consider how best to remedy the Secretary's apparent continuing intent to apply the step two severity regulation in a manner that conflicts with the Act and the controlling case law."

Thus the circuits which have invalidated the Secretary's construction and application of the regulation, such as the Stone Court, have used the same analysis as that used by courts which have invalidated the regulation per se. Each court has found that the regulation has been used in a manner which violates claimants' rights. Whether the needed reform must be published as a regulation or can be implemented through rulings and manual changes simply does not warrant review by this Court.

Petitioner has also undertaken to discover a split between the Yuckert decision and Johnson v. Heckler, supra, by portraying the present case as precluding the possibility of a de minimis screening standard. Petitioner states:

> "[T]he [Yuckert] court held that the severity regulation is inconsistent with 42 U.S.C. §423(d)(2)(A), which provides that a claimant may be found to be disabled only if his impairments are of such severity that he is not only unable to do his previous work but

> cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. The court interpreted this provision to require the Secretary 'to consider factors such as [the claimant's] age, education, work experience, and ability to do past work' in every individual disability determination, irrespective of whether the claimant has demonstrated that his impairment satisfies a threshold level of severity. App., infra, 5a, 9a."

Pet. at 8 (emphasis added).

This characterization is pure fabrication. The underlined phrase does not appear anywhere in the Yuckert decision.[9] In fact, there has as of yet been no discussion in the present case, either at the district court level or in the Ninth Circuit, of what sort of de minimis screening standard might comply with the Social Security Act.

Finally, in an attempt to reinforce his argument that there is a significant split in the circuits, the Petitioner argues that the Secretary and the state agencies must know whether they may apply the severity regulation to the "scores of thousands of disability claims filed." Pet. at 11. The more relevant question would be whether the "severity step" as it has been applied is valid. Petitioner does know the answer to this question, having been told very clearly by every circuit which has considered the issue that the Secretary may not use the

---

[9] Petitioner has similarly mischaracterized the Yuckert holding in his petition for certiorari in Johnson. That petition states:

> "[T]he Ninth Circuit held that the severity regulations are invalid because ... (ii) they do not provide for a specific consideration of the claimant's age, education, and work experience in every case." Petition for a writ of certiorari, Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), reh. den. 776 F.2d 166 (1985) petition for cert. filed No. 85-1442 (Feb. 28, 1986), p. 13.

Petitioner then proceeds in the Johnson petition to urge this Court to accept Yuckert as a "more appropriate vehicle" for certiorari, reasoning that this (incorrect) characterization of Yuckert conflicts with Johnson.

"severity step" to deny benefits to claimants who might otherwise be able to prove their eligibility for benefits.[10]

Not every difference in the holdings of different Circuits warrants resolution by the Supreme Court. As Justice Harlan wrote, nearly 30 years ago:

> "... [A] conflict of decisions may safely be relied on as a ground for certiorari in instances where it is clear that the conflict is one that can be effectively resolved only by prompt action of the Supreme Court alone." [11]

Certainly this is a case where Supreme Court intervention is not warranted.

B. Even If The Distinction Between The Rulings of the Circuits Were Significant, They Cannot Be Adequately Resolved In This Case At This Time.

There is no basis for the Secretary's designation of this individual case as an "appropriate vehicle" for review of the "severity step." Petition for cert. Johnson v. Heckler, supra, p. 13. Even if the differences in reasoning of the circuit courts were significant, resolution of those differences by the Supreme Court at this time and in the present case is inappropriate for three reasons. Firstly, Ms. Yuckert's disability claim may well be resolved by the remand proceedings below. Secondly, the absence in this case of any discovery or factual development regarding the history, the functioning, and broad impact of the "severity step" makes review of this case by this Court inappropriate. Finally, where the Secretary has so recently attempted to enunciate a standard to comply with the de minimis screening principles articulated by the circuit courts of

---

[10] The Petitioner's allegation that orders enjoining the severity step have produced "substantial disruption in the administration of the Social Security disability program" (Pet. at 22-23) contradicts his own findings in previous statements. See Letter from Associate Commissioner of Disability, Patricia Owens, to all Disability Determination Services Administrators (Dec. 16, 1985) regarding implementation of the not severe impairment policy clarification. Using the present case as an illustration, there is every reason to think that Janet Yuckert's capacity to return to her past work could have been considered with minimal expense and effort.

[11] Mr. Justice Harlan, "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 Australian L.J. (1959), quoted in Stern and Gressman, Supreme Court Practice, 5th ed. 1978.

appeals, and the trial courts have not been given the opportunity to consider the factual contexts in which the new ruling will be utilized, this Court has neither the obligation nor the resources to consider whether SSR 85-28 articulates such a de minimis standard.

The Ninth Circuit ordered that Janet Yuckert's claim be reevaluated by the Secretary "without reference to the severity regulation." Yuckert v. Heckler, 774 P.2d, at 1371. Whether the Secretary finds that Janet Yuckert is disabled or not, the result of this reevaluation will be to make the present proceedings moot. Were the present proceedings in the nature of an appeal from a district court to a circuit court of appeals, it is probable that, in light of the pending remand, there could be no "final decision" and appeal would be improper. As stated by Mr. Justice Blackmun (then Circuit Judge), "[u]ntil the Secretary acts on the remand we have no insight as to what his eventual decision will be." Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967), cited in Dalton v. Richardson, 434 F.2d 1018 (2d Cir., 1970), cert. den. 401 U.S. 979 (1970).[12]

Ms. Yuckert is an individual claimant who did not challenge the validity of the severity regulations in the district court. Accordingly the present case presents no analysis or discovery regarding either the impact of the severity step on impairments other than Ms. Yuckert's or what mechanism, if any, might properly replace the "severity step."[13] The district court opinion is an unpublished one-page order adopting the short recommendation of the Magistrate, which turned on the question of substantial evidence. The Ninth Circuit analysis is based on solely legal grounds. An analysis which must focus on

---

[12] See also Gilchrist v. Schweiker, 645 F.2d 818 (9th Cir. 1981); Mayersky v. Celebrezze, 353 F.2d 89 (3d Cir. 1965); Whitehead v. Califano, 596 F.2d 1315 (6th Cir. 1979). But see Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), rev'd on other grounds sub nom. Richardson v. Perales, 402 U.S. 389 (1971).

[13] This Court has previously dismissed writs of certiorari as improvidently granted where the record was insufficient for an adequate consideration of the questions raised by the court. See Massachusetts v. Painten, 389 U.S. 560 (1968); Johnson v. Massachusetts, 390 U.S. 511 (1968); Wainwright v. New Orleans, 392 U.S. 598 (1967); Smith v. Mississippi, 373 U.S. 238 (1963).

the facts of a single case with a necessarily sparse record would limit and improperly affect this Court's review. This Court needs a factual analysis of the impact of the "severity step" presented by the complex and varied factual records in class actions.

The volumes of discovery documents produced pursuant to class action challenges have illuminated internal controversies and criticisms of the severity step. Although Petitioner has alleged that the severity regulation invalidated in Yuckert facilitates the "fair, efficient, and uniform adjudication" of disability claims, Pet. at 10, his own actions indicate a recognition of the need for broader factual development on this issue. The Secretary supported Respondent's motion to stay proceedings in the Ninth Circuit in the present case pending resolution of the legality of the severity step in a class action. See Statement of the Case, supra, pp. 2-3. In addition the Secretary recently ordered a broad-based study of the severity step.[14] The results of the study reveal a lack of uniform application of the severity step in approximately 40% of a test sample of 800 cases. In 309 cases, the Office of Disability physicians assessed the severity level of the impairment(s) differently than did the State physicians, or questioned the documentation used to assess severity. The study concluded that "misunderstanding regarding the threshold level of not severe cases (the level at which an impairment is considered severe rather than not severe) was clearly exhibited." (Report, p. 6.) Nor is this the first study undertaken by the Secretary to come to this conclusion.[15]

It was at least partly in recognition of widespread "misunderstanding and misapplication of the not severe threshold"

---

[14] Smith v. Heckler, Civ. No. F83-1609 EJG, Supplemental Response to Plaintiffs' Second Request for Production of Documents. "Report on the Not Severe Case Study -- information," dated March 14, 1986, Associate Commissioner of Disability to Regional Commissioners.

[15] See "Final Report and Recommendations" contained in Memorandum to Acting Deputy to the Deputy Commissioner for Programs and Policy of the Department of Health and Human Services from Leader, "Not Severe Impairment Workgroup," (Aug 23, 1983) (obtained in discovery in Dixon v. Heckler, supra, and Smith v. Heckler, supra.

that the Secretary issued Social Security Ruling 85-28, "to resolve the inconsistent application of the not severe policy." Report, p. 7. The cautious language of SSR 85-28, the attempt to articulate a de minimis standard that appears on the final pages of the Secretary's petition in this case (Pet. at 23-24), the recent study and the existence of at least one previous study, all suggest that the Secretary is well aware of the need for a remedy that will respect the statutory mandate of individualized assessments in disability determinations.

These developments may well play a significant role in future severity step litigation. As the Petitioner admits, the Yuckert Court "expressed no view on the validity of the new ruling," Pet. at 10, nor has any other circuit court opinion (whether finding the current regulations invalid or the Secretary's policies and practices invalid) foreclosed the possibility of the Secretary promulgating and implementing a valid de minimis screening standard. Whether or not a standard can be devised that can operate as a de minimis screening device is largely a factual question which must be answered in the context of its actual application, and which should be addressed initially in the trial courts.[16]

---

[16] In declining to rule on the validity of SSR 85-28, the Ninth Circuit relied in part on the fact that the "ruling" submitted by government counsel had not yet been published. Indeed, the published version of SSR 85-28, which was issued a month after the Ninth Circuit's decision, contained a number of significant modifications. The Secretary removed language requiring that basic work activities be "prevented"; revised the ruling's footnote regarding older individuals to relax eligibility requirements; and revised the ruling's language to make clear that the ruling contemplated not severe findings in some cases of individuals who could not, in fact, return to their prior work. Thus, even if the Ninth Circuit had decided the validity of the version of the proposed ruling submitted by government counsel, it could not have adjudicated the abstract validity of a final ruling that was not yet published.

In any event, Ms. Yuckert's individual case is not a proper context for considering the validity of the Secretary's new ruling. The ruling was not applied in her case. To the extent that injunctions in other cases may restrict the Secretary's ability to employ his new ruling, the proper course for the Secretary is to seek relief, if appropriate, from the courts that issued those injunctions.

C. Petitioner's Argument That the Legislative History Validates the Severity Step Is Inappropriate At This Time And In Any Event Has Been Universally Rejected.

The Secretary devotes fully ten pages to restating the universally rejected position that the severity step has been validated by the legislative history of the various amendments of the Social Security Act.[17] The purpose of rearguing one aspect of the Secretary's position in a petition for writ of certioari is not apparent, especially since the Secretary does not even allege that the circuits are divided on this question. However, since the Secretary has devoted so much attention to this argument, some response is required.

The definition of disability has remained basically unchanged since it was introduced into the Social Security Act in 1954:

> "... inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a period of not less than 12 months."

42 U.S.C. §423(d)(1)(A), and 1382c(a)(3)(A). (Emphasis added.)

This definition attaches no conditions to the nature of the impairment, so long as it is medically determinable, of sufficient duration, and results in the inability to do any substantial gainful work.

In 1967, Congress elaborated on the basic definition in what is now 42 U.S.C. §423(d)(2)(A) and (3) (P.L. 90-248). The Congressional reports accompanying the 1967 amendments indicate the motivation for this elaboration was concern that certain courts had found claimants disabled not because they were unable to engage in any substantial gainful activity, but rather because the work they were able to do was unavailable in their geographic area or because they would be unlikely to be hired for jobs that they could do. S.Rep.No. 744, 90th Cong., 1st Sess. (1967),

---

17 See, e.g., Johnson v. Heckler, supra, 769 F.2d at 1212 ("The legislative history of the 1984 amendment cuts against, rather than supports, the Secretary's arguments in this case."); and Baeder v. Heckler, supra, 768 F.2d at 551 ("Both the statute and the legislative history speak in terms of medical and vocational factors and emphasize the importance of the relation between the two.")

reprinted in [1967] U.S. Code Cong. & Admin. News 2880-2881; H.Rep.No. 544, 90th Cong., 1st Sess. (1967), 28-31. These provisions make it clear that disability claims must be based on "anatomical, psychological abnormalities," but that the measure of disability remains the ability to work. Specifically:

> "An individual (except a widow, surviving divorced wife, widower or surviving divorced husband for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...."

42 U.S.C. §423(d)(A). (Emphasis added.)

The 1967 amendments also demonstrate the vocational measure of disability by contrasting the deliberately "more restrictive" definition of disability applicable to widows and widowers. Disability for surviving spouses is defined "... solely on the level of severity of the impairment ..." and "...without regard to nonmedical factors such as age, education and work experience, which are considered in disabled worker cases." S.Rep.No. 744, supra, at 2882; see also H.Conf.Rep.No. 1030, 90th Cong., 1st Sess. (1967), reprinted in [1967] U. S. Code Cong. & Admin. News 3197-3198.

Finally, in 1984 Congress passed section 4(a)(1) of the Reform Act (Pub.L. 98-460, signed Oct. 9, 1984) which mandated the consideration of the combined effect of impairments. Petitioner has attempted to make much of this amendment. However, as observed recently in McDonald v. Heckler, 624 F.Supp. 375, 379 (D.Mass. 1985), there is no reason to think this language was intended to do anything "more than require the Secretary to discontinue h[is] policy of refusing to consider the combined effect of non-severe impairments." See also Johnson v. Heckler, supra, 769 F.2d at 1214.

Since Congress is constantly in the process of refining the Social Security Act, the volume of legislative history which has accumulated since the disability program was instituted is extensive. The Secretary's argument that the legislative history supports his position consists of an attempt to comb through this

history for phrases which arguably support his position. In spite of the vastness of the legislative history available to the Secretary, he has produced nothing which would alter the plain language of the statute.

IV. CONCLUSION

For all the foregoing reasons, the Secretary's petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES A. DOUGLAS, ESQ.
GIBBS, DOUGLAS, THEILER & DRACHLER
1613 Smith Tower
Seattle, WA 98104
(206) 623-0900

Counsel for Janet J. Yuckert

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER, v. JANET J. YUCKERT	No. 85-1409

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the following by air mail on April 21, 1986 addressed to Edwin S. Kneedler, Assistant to the Solicitor General, Department of Justice, Washington, DC 20530:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Affidavit in Support of Motion for Leavel to Proceed in Forma Pauperis
Brief in Opposition to Petition for a Writ of Certiorari

James A. Douglas
JAMES A. DOUGLAS

SUBSCRIBED AND SWORN this 21 day of April, 1986.

KIM WATTS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-29-88

Kim Watts
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

(3)

No. 85-1409

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

11PP

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We have demonstrated in the certiorari petition that the "severity" regulation invalidated by the court of appeals in this case has been a feature of the Social Security disability program since 1960 and is explicitly supported by the text and legislative history of the Social Security amendments of 1954, 1967, and 1984. Despite this overwhelming support for the regulation, the clear conflict in the circuits on the question of the validity of the regulation, and the broad importance of that question, respondent urges the Court to deny certiorari.

1.a. Respondent errs in contending (Br. in Opp. 4-9) that there is no circuit conflict to be resolved by this Court. The court of appeals in this case stated that it "now find[s], along with the Third and Seventh Circuits, that the regulation violates the Act" (Pet. App. 8a, citing *Johnson* v. *Heckler*,

769 F.2d 1202, 1210-1213, reh'g denied, 776 F.2d 166 (7th Cir. 1985), petition for cert. pending, No. 85-1442; *Baeder* v. *Heckler*, 768 F.2d 547, 551-553 (3d Cir. 1985)). In addition, since the time of the court of appeals' decision, the Eighth and Tenth Circuits also have invalidated the severity regulation. See *Hansen* v. *Heckler*, 783 F.2d 170 (10th Cir. 1986); *Brown* v. *Heckler*, 786 F.2d 870 (8th Cir. 1986).[1]

At the same time, the court below recognized that its holding conflicts with that of "[s]everal circuits [that] have upheld the severity regulations by construing the threshold severity showing as a 'de minimis' requirement" (Pet. App. 8a n.6). As we have explained in the certiorari petition (Pet. 22), the Fifth, Sixth and Eleventh Circuits all have held that the severity regulation, as so construed, is valid. See *Garza* v. *Heckler*, 771 F.2d 871, 873 (5th Cir. 1985); *Stone* v. *Heckler*, 752 F.2d 1099, 1101-1103 (5th Cir. 1985); *Salmi* v. *Secretary of Health & Human Services*, 774 F.2d 685, 69-692 (6th Cir. 1985); *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (6th Cir. 1985); *Flynn* v. *Heckler*, 768 F.2d 1273, 1274-1275 (11th Cir. 1985); *Brady* v. *Heckler*, 724 F.2d 914, 918-920 (11th Cir. 1984). See also *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984). The First Circuit also has now sustained the regulation. See *Andrades* v. *Secretary of Health & Human Services*, No. 85-1804 (May 7, 1986).

---

[1]In *Dixon* v. *Heckler*, 785 F.2d 1102 (2d Cir. 1986), a New York State-wide class action, the court affirmed a preliminary injunction barring the use of the severity regulation. However, the panel did not finally resolve the question of the validity of the regulation; instead, applying the abuse-of-discretion standard for review of the preliminary injunction (*id.* at 1106), the court was unable to conclude that the district court contravened that standard in finding that the plaintiffs had established a likelihood that they would exceed on the merits of their claim (*id.* at 1107).

Like the Ninth Circuit in this case, other courts of appeals have expressly acknowledged the existence of a circuit conflict on the question of the validity of the severity regulation. For example, the Eighth Circuit stated in *Brown*, slip op. 4-5:

> The Circuits are divided on this question. Three Circuits have accepted Brown's argument and have invalidated the provision. * * * The five other Circuits that have considered the question have refused to invalidate the second step, but have interpreted it as a de minimis, threshold requirement.

See also *Hansen*, 783 F.2d at 176 ("We decline to follow those courts which have construed the regulation to embody a de minimis standard."); *Baeder*, 768 F.2d at 553 ("other courts have directed the Secretary to apply the regulation only to bar claims of those with *de minimis* medical complaints"); *Salmi*, 774 F.2d at 689 n.3 (noting conflict with *Johnson* and *Baeder*).

b. Respondent argues (Br. in Opp. 4-5, 8), however, that there is no circuit conflict because all of the courts of appeals have disapproved of the Secretary's practices with regard to the severity step and the invalidation of the regulation in this and other cases presents only a question of "remedy." This effort to avoid what the courts of appeals themselves identify as a conflict in their rulings is unavailing.

The Secretary made clear when the severity regulation was promulgated in its existing form in 1978 that it was not intended to "alter the level[] of severity for a finding of * * * not disabled on the basis of medical considerations alone" and that the regulation addresses impairments that "have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective of his or her age, education, and work

experience" (43 Fed. Reg. 9296, 58353 (1978)). The Secretary reiterated this interpretation of the regulation in Social Security Ruling (SSR) 85-28 (reproduced at Pet. App. 37a-44a), which was published in November 1985 to ensure that the severity regulation is properly applied at step 2 of the sequential evaluation process. The courts that have sustained the regulation have given it the same interpretation, even while disapproving the application of the regulation in particular cases. See, *e.g.*, *Andrades*, slip op. 4; *Salmi*, 774 F.2d at 690-692; *Stone*, 752 F.2d at 1101-1103, 1106; *Brady*, 724 F.2d at 1274-1275. By contrast, the Ninth Circuit in this case explicitly *declined* to adopt an interpretation of the regulation as applying to "slight" or "de minimis" impairments, concluding instead that the regulation itself is altogether invalid (Pet. App. 8a-9a n.6, 11a).

2. Contrary to respondent's contention (Br. in Opp. 10-11), there is no need for factual development in district court. The only issue before this Court is whether the severity regulation is invalid on its face. That is a question of law, and as respondent concedes (*id.* at 10), "[t]he Ninth Circuit's analysis is based on solely legal grounds." If the Court sustains the regulation against respondent's facial challenge, questions regarding its application in particular factual circumstances can be resolved as they arise.

Respondent also errs in suggesting (Br. in Opp. 11-12) that an internal study of the severity step conducted by the Social Security Administration counsels against granting certiorari in this case. See Associate Commisssioner for Disability, Social Security Administration, *Report on the Not Severe Case Study* (Mar. 14, 1986) [hereinafter cited as *Report*].[2] In fact, however, that study reinforces the need for review by this Court, because it concludes that the

[2]We have lodged a copy of the *Report* with the Clerk of this Court.

severity step of the sequential evaluation process is "crucial to consistent decisionmaking" (*id.* at 13). The study was undertaken prior to the implementation of regulatory and legislative changes (such as the requirement that multiple impairments be considered, see Pet. 17-20) and prior to the issuance of SSR 85-28. Thus, although respondent quotes the passage in the final *Report* that there was "misunderstanding [on the part of the state agencies] regarding the threshold level of not severe cases" (Br. in Opp. 11, quoting *Report* at 6), she fails to point out that the Report states that SSR 85-28 was promulgated for the very purpose of eliminating that confusion. *Report* 7, 8-9, 12, 13. In other words, the *Report* and SSR 85-28 were intended to ensure that the severity regulation is properly *applied*. This case presents the distinct, threshold question of whether the regulation is valid *on its face*. The holding by the court below and other courts that it is not warrants review by this Court.

3. Respondent makes little effort to rebut our showing (Pet. 11-21) that the court of appeals plainly erred on the merits. Since the commencement of the disability program in 1954, both Congress and the Secretary have made clear that benefits may be denied on the basis of medical factors alone. Respondent does not even advert to the text or legislative history of the Social Security Amendments of 1954, ch. 1206, § 106(d), 68 Stat. 1080, in which the statutory definition of the term "disability" in 42 U.S.C. 423(a)(1)(D) and 1382(a) was first enacted. As we have explained (Pet. 11-12), the committee reports on the 1954 amendments make clear that a claimant may be required to demonstrate that he has a "medically determinable impairment of serious proportions" before it is necessary for the decision-maker to decide whether he is unable to work by reason of that impairment. H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954).

Moreover, although respondent does cite (Br. in Opp. 13-14) the committee reports on the 1967 amendments, she does not acknowledge the portions of those reports, quoted in the certiorari petition (Pet. 15), which state that a person may be found disabled "only if it is shown that he has a severe medically determinable physical or mental impairment or impairments." S. Rep. 744, 90th Cong., 1st Sess. 48 (1967); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967). This legislative history is particularly significant in view of the fact that then-existing regulations *already* provided that benefits could be denied on medical grounds alone. See Pet. 13. Respondent asserts (Br. in Opp. 13) that the more stringent requirements in the 1967 amendments were enacted only as a result of holdings by some courts that a claimant was disabled because the work he was able to perform was unavailable in the geographical area or because he was unlikely to be hired for jobs he could do. But this assertion ignores the statements in the committee reports that Congress also was responding to judicial rulings regarding "the kind of evidence necessary to establish the existence and *severity* of an impairment" and that the amendments were intended to "reemphasize the predominant importance of *medical* factors in the disability determination" (S. Rep. 744, *supra*, at 48; H.R. Rep. 544, *supra*, at 29-30) (emphasis added)).

Equally unavailing is respondent's attempt to explain the amendments made by the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*, as nothing more than a requirement that the Secretary discontinue the policy of declining to consider the combined effect of non-severe impairments. See Br. in Opp. 14. Respondent's submission ignores the obvious fact that the combined effect of impairments is important principally in the application of the severity regulation that the Ninth Circuit invalidated in this case. And the text of the 1984 Act

establishes that Congress ratified the existence of that regulation. It directs the Secretary (i) to consider the combined effect of a claimant's impairments in determining whether they are of "sufficient *medical severity*" even to be the basis for eligibility, and (ii) if he finds a "*medically severe* combination of impairments," to consider the combined effect of such impairments "throughout the disability determination process" (§ 4, 98 Stat. 1800-1801 (emphasis added)). Furthermore, as we have explained (Pet. 18-20), the legislative history of the 1984 Act makes unambiguously clear that Congress contemplated the continued application of the severity step of the sequential evaluation process. The court of appeals failed to respect that deliberate judgment by Congress.

4. The question of the validity of the severity regulation is of broad importance in the administration of the Social Security disability programs, because the sequential evaluation process contemplates that the regulation will be applied as a screening measure to *every* claimant who is not already engaged in substantial gainful activity. Approximately two million such claims are filed each year. It is essential for the Secretary, state agency adjudicators, and claimants to know whether the severity regulation can be validly applied to those claims. It also is important for this Court to resolve the widespread litigation in the lower courts regarding the validity of the regulation. See Pet. 21-23.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

MAY 1986

No. 85-1409 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

JOINT APPENDIX

CAROLE GROSSMAN, ESQ.
Legal Services of Northern California
2230 Cassidy Lane
Rte 2, Box 2230
Davis, CA 95616
(916) 756-3297

JAMES A. DOUGLAS, ESQ.
Gibbs, Douglas, Theiler & Drachler
1613 Smith Tower
Seattle, WA 98104
(206) 623-0900

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 21, 1986
CERTIORARI GRANTED MAY 19, 1986

6 APP

Page

Page

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-4432

JANET J. YUCKERT, PLAINTIFF-APPELLANT

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE

RELEVANT DOCKET ENTRIES

Date	Filings – Proceedings
	* * * * *
1/3/85	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
	* * * * *
3/6/85	Filed aplt's motion to remand.
3/6/85	Filed aplt's motion for ext of time to file brief.
3/11/85	Filed aplee's notice of opportunity for remand.
3/20/85	Filed order (MIN ATTY/DEPY CLK, RGK) Appellant's motion of March 6, 1985 for an extension of time is granted. The opening brief, if necessary, shall be filed within 21 days of the ruling on appellant's motion to remand. The remainder of the briefing shall proceed in accordance with Fed. R. App. P. 31(a). Subject to reconsideration if any opposition filed within 10 days.
4/18/85	Filed order (WRIGHT & HUG) Appellant's motion to remand this case is denied.
	* * * * *

Date	Filings – Proceedings
8/16/85	Filed aplt's motion to stay proceedings pending resolution of similar cases. (panel)
8/22/85	Filed aplee's response to aplt's motion to stay proceedings; no opposition. (panel)
8/27/85	Filed order (in Seattle), as of Aug. 22, (Dep Clk) motion to stay proceedings is denied. Argument will be heard in Seattle on Sept. 3, 1985, as scheduled.
9/3/85	CAUSE ARGUED & SUBMITTED TO: WRIGHT, PREGERSON, ALARCON, CJJ.
10/8/85	Rec'd, as of Oct. 7, letter dated 10/4/85 from aplee counsel re attached addl. citations. (panel)
10/17/85	Rec'd letter from aplt counsel dated 10/15/85 objecting to aplee's letter dated 10/4/85. (panel)
10/25/85	AS OF 10/24, ORDERED OPINION FILED AND JUDGMENT TO BE FILED AND ENTD.
10/25/85	AS OF 10/24, FILED OPINION – REVERSED & REMANDED.
10/25/85	AS OF 10/24, FILED AND ENTERED JUDGMENT.
11/6/85	Filed mtn & Ord (dpty clk) granting federal aple's an extension of time to and including December 5, 1985, in which to file their petition for rehearing.
12/9/85	Filed as of 12-05-85, appellee's motion for further extension of time to file petition for rehearing or petition for rehearing en banc. (12-05-85) (PANEL)
12/11/85	Filed appellant's opposition to defendant-appellee's motion for further extension of time (PANEL).

Date	Filings – Proceedings
12/12/85	Filed Order (WRIGHT, PREGERSON, and ALARCON, CJJ) aple's motion for an extension of time within which to file a petition for rehearing with suggestion for rehearing en banc is granted. The petition and suggestion may be filed no later than December 19, 1985.
1/9/86	Filed order, as of 1/7/86, (Wright, Pregerson & Alarcon) the Opinion filed in the above matter on October 24, 1985, is amended as follows (see casefile).
1/30/86	MANDATE ISSUED
3/4/86	Rec'd, as of Mar 3, notice from Sp Ct re filing of petition for cert. Filed in Sp Ct 2/21/86, SC #85-1409.
4/21/86	Filed appellant's motion for order requiring compliance with mandate. (04-18-86) (PANEL)
4/23/86	Filed appellee's motion for extension of time to respond to plaintiff/appellant's motion for order requiring compliance with mandate. (04-22-86) (PANEL)
5/2/86	Received as of 04-28-86, appellee's response to motion requiring compliance with mandate (04-25-86) (PANEL).
5/29/86	Rec'd, as of 5/27/86, 4 copies aple's Petition for Writ of Certiorari to the Supreme Court.
5/29/86	Rec'd, as of 5/23/86, copy of order filed in Supreme Court 5/19/86 granting the petition for writ of certiorari.
6/13/86	Filed Order: The motion for order requiring compliance with mandate filed April 21, 1986, is dismissed as moot.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

No. C82-953M

JANET J. YUCKERT, PLAINTIFF

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

RELEVANT DOCKET ENTRIES

Date	NR	Proceedings
8/18/82	–	LODGED Mtn & Affd for IFP and Complaint
8/19/82	1	ORDER (PKS) granting IFP.
8/19/82	2	MOTION of pltf to proceed IFP w/affd.
8/19/82	3	COMPLAINT to review & set aside decision under Social Security Act.
8/31/82	4	CERTIFICATE–of service of s/c on Atty Gen in DC and on U.S. Atty in Seattle
11/12/82	6	ANSWER–of deft
11/15/82	7	PRAECIPE–to file the attached administrative record with the answer filed 11-12-82.
3/18/83	10	ORDER OF REF.–Magistrate Weinberg. CC's.
3/23/83	12	MEMORANDUM–of deft.
4/7/83	13	REPLY BRIEF–of pltf
5/9/84	14	REPORT & RECOMMENDATION–of JLW obj by 5-23-84
5/9/84	–	LODGED–order affirming secretary

Date	NR	Proceedings
5/17/84	15	OBJECTIONS–of pltf to R&R 6-1-84
5/24/84	16	MEMORANDUM–of deft in support of R&R
10/24/84	17	ORDER adopting R&R; decision of Secy affirmed. cc: parties, WTM & JLW. entered & mailed 10/25/84
10/25/84	18	JUDGMENT secy affirmed. ent & mld 10/25/84.
12/20/84	19	NOTICE OF APPEAL by pltf from final judgment ent 10/25/84.
4/22/85	23	ORDER–of CCA that appellant's mtn to remand case is denied. (ent 4/22/85)
2/3/86	26	JUDGMENT–from CCA that judgment of district court is reversed & remanded. (ent. & mld 2/3/86)
3/19/86	27	MOTION by pltf for order of remand noted: 4/4/86
3/19/86	–	LODGED order of remand
3/19/86	28	MOTION to sht time noted: 3/21/86
3/19/86	–	LODGED order sht time
3/19/86	29	CERTIFICATE of srvc of documents #27 thru #29
3/20/86	30	ORDER sht time is granted, mtn for order of Remand noted: 3/21/86. ent & mld 3/20/86
3/21/86	30a	RESPONSE by dft to pltfs mtn for Remand
3/25/86	31	MINUTE ORDER pursuant to dfts suggestion that Secty of HHS has filed petition for Writ of Certiorari in Supreme Ct in this cs the Ct will defer action on mtn for remand pending outcome in Supreme Ct. of disp of this matter by Supreme Ct. ent & mld 3/25/86

Date	NR	– Proceedings
4/4/86	32	MOTION by pltf for reconsideration Ct minute order of 3/25/86 & for remand noted: 4/25/86
4/4/86	–	LODGED order of remand
4/4/86	33	MOTION to sht time noted: 4/9/86
4/4/86	–	LODGED order sht time
4/4/86	34	CERTIFICATE of srvc of #32 thru #34
4/9/86	35	MINUTE ORDER granting pltfs mtn to sht time to 4/9/96 & mtn for reconsideration is denied. ent & mld 4/9/86
4/9/86	36	OPPOSITION by dft to plfts mtn for reconsideration

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL
Receipt of Additional Evidence

In the case of	Claim for Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
JANET J. YUCKERT *(Claimant)*	
(Wage Earner) (Leave blank if same as above	531-34-8353 *(Social Security Number)*

Evidence in addition to that which was before the administrative law judge has been received by the Appeals Council and is hereby made a part of the record. That evidence consists of the following exhibit(s):

AC-1 Additional professional qualifications of Vocational Expert, Janet Hart Mott

AC-2 Psychological Testing administered by Janet Hart Mott including actual test forms—WRAT, Wechsler memory scale and adult intelligence (WAIS), Raven Progressive Matrices, and Crawford Small Parts Dexterity Test

APPEALS COUNCIL

Date: 6/24/82

/s/ LAWRENCE WEINER
Lawrence Weiner, Member

BEFORE THE APPEALS COUNCIL OF SOCIAL SECURITY ADMINISTRATION

No. 531-34-8353

JANET J. YUCKERT

MEMORANDUM IN SUPPORT OF REQUEST FOR REVIEW

INTRODUCTION

Janet J. Yuckert is a 45-year old former travel agent who suffers from a bilateral labyrinthine dysfunction. This causes her significant problems with focusing and refocusing her eyes, dizziness and equilibrium. She also has problems with her feet. Claimant has requested review by the Appeals Council of the decision rendered on December 22, 1981 by Administrative Law Judge William T. Sode denying social security disability insurance benefits. The application was filed on October 30, 1980 alleging an onset date for disability of January 19, 1980. The hearing before Judge Sode was held on September 9, 1981. The Request for Review was timely filed.

At the hearing claimant testified, along with her sister and vocational expert Janet Hart Mott. She has submitted additional evidence to the Appeals Council in the form of additional professional qualifications for Ms. Mott, as well as a copy of the underlying data from the tests which were administered. All these documents should be admitted pursuant to 20 CFR § 404.970(b).

BASIS FOR REVIEW

The Administrative Law Judge found that claimant was exaggerating the effects of her impairment, that her condition does not significantly limit her ability to perform

basic work-related functions, and is therefore not a severe impairment. Findings 3-6.

Under 20 C.F.R. § 404.970, the Appeals Council is to review a hearing decision where

> (a)(2) There is an error of law;
>
> (3) The action, findings, or conclusions of the administrative law judge are not supported by substantial evidence.
>
> * * *
>
> (b) If new and material evidence is submitted with the request for review, the Appeals Council shall review the entire record. It will review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently on the record.

The hearing decision should be reviewed, and reversed for the following reasons:

1. There is no support by substantial evidence for the findings that
   a. Claimant is exaggerating the effects of her impairments. Findings 3.
   b. The claimant's medical condition does not significantly limit her ability to perform basic work-related functions; therefore she does not have a severe impairment. Findings 4-5.
2. The Administrative Law Judge committed errors of law when
   a. He failed to consider all the evidence of record.
   b. He failed to give reasons for rejecting uncontradicted expert opinion.
   c. He failed to give the appropriate weight to the opinions of claimant's treating physician.

ISSUES WARRANTING REVIEW AND REVERSAL

1. The Findings and Conclusion of No Disability are Not Supported by Substantial Evidence. Substantial Evidence Shows Disability.

Disability is defined at 42 U.S.C. § 423(d)(1)(A). A claimant is under a disability if his

> . . . physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . 42 U.S.C. § 423(d)(2)(A)

At her hearing the claimant testified that she has not been able to work since October, 1979. The principle problem is with her vision, in focusing and re-focusing. She testified she can just see one word at a time. This makes the use of her eyes a tremendous strain. She has problems with dizziness, which has been with her constantly since January, 1980. She has a balance problem where she tends to fall to her right side. She has learned to compensate by holding onto walls, furniture, counters and staying within reach of something she can grab. She suffers extremely severe headaches, currently two or three per week. Previously they were all the time. When she gets such a headache she takes medication and goes to bed. Her condition makes her weak and shakey.

Finally, she has had flat feet since she was a girl. She testified she cannot stand or walk for more than three hours.

Claimant testified concerning the four episodes of her condition which preceded its permanent onset in January, 1980. The episodes began with five days of severe headaches. On the sixth day her equilibrium was completely gone. She could not focus her eyes. She recovered for short periods, but with the exception of one week, she has suffered this condition since October, 1979.

Her activities have been greatly restricted. In 1980 the only time she left her apartment was to go out for the mail (which was one apartment away from hers) or to the doctor. Her sister would also take her to visit her parents. A friend would take her shopping once every two weeks. She was not able to take herself anywhere. During that same year she slept 12 to 15 per night along with a daily nap of 1 to 2 hours.

Now she attempts to attend community college. She testified that in the summer 1980 quarter, for example, she had seven credits. She went to class daily. After class she would take a nap of 2 to 3 hours. She then needed to study 8 to 10 hours—studying 30 minutes and taking a break of 30 minutes—for 8 to 10 hours. She would frequently take a second evening nap.

That summer quarter she was taking approximately half a course load. She testified it takes her much, much longer than the average student to complete her studying. This is because of her lack of stamina, and her vision problem which makes her read so slowly.

She has trouble bending because of her balance problems. She does not cook for herself, because it is too difficult to use both hands and maintain her balance. She has no social life because of her condition. She used to enjoy parties, and sporting events, but no longer. She used to dance a great deal, take long drives and travel extensively overseas. She used to play the piano. She used to sew and knit. She can do none of these now because of her condition. She can only drive very slowly and cautiously. She does not drive except to and from her classes.

She formerly worked as a travel agent. In addition she has some training and worked briefly in real estate sales. She can return to neither of these jobs. As a travel agent she had to be very accurate, for example, in constructing a complicated international fare. She had to do extensive reading of schedules and technical material which were

very fine print. She had to work quickly. She had to work long hours and have a lot of stamina. She has tried to read airline guides and is not able to. She is unable to do real estate sales work for many of the same reasons. In addition she cannot do the necessary driving.

Claimant's sister Mary Yuckert testified concerning claimant's limitations, confirming her testimony. She stated, for example, that claimant "has to exert an extreme amount of pressure on herself to do simple ordinary, everyday tasks." She is not physically able to do anything as rapidly as she used to be able to.

Vocational rehabilitation counsellor Janet Hart Mott also testified concerning vocational evaluation and testing. On the Wechsler Adult Intelligence Scale, the overall score was within the average range; however, of much greater significance was the extremely wide scatter of sub-tests scores. For example, the ability to coordinate and use eyes and hands was at the first percentile. The score on the Wide Range Achievement Test was within the 12th grade-level, although claimant complained of dizziness when keeping her eyes focused on a wide line. The Wechsler Memory Scale indicated many of her abilities were still intact, although she had difficulty remembering verbal instructions and difficulty doing simple arithmetic in her head. The Wraven Progressive Matrices showed that most skills were intact.

Significant were the results of the Crawford Small Parts Dexterity Test, which measures fine eye-hand coordination. Her scores were between the first and fifth percentile, accompanied by dizziness. Ms. Mott reviewed the results of the MMPI administered by Dr. Robert Stephens. The test was not re-administered because of claimant's difficulty focusing and concentrating. The results indicated a probable need for psychiatric evaluation. Claimant is operating under a great deal of stress, trying valiently to stay emotionally intact.

Ms. Mott stated that claimant was extremely cooperative under testing. She stated that "she could not imagine" claimant was malingering. Her manner in taking the tests was very slow and deliberate, using an inordinate amount of time.

Ms. Mott concluded that the time claimant would require to do any job skill would not be competitive. It was not possible for her to return to any employment she had previously engaged in. There are no jobs which exist in significant numbers in the national economy that she can do on a regular and sustained basis. This has been true since January, 1980 and will continue to be true until her condition improves.

In response to questions by the Administrative Law Judge, Ms. Mott stated that claimant compensates for her condition by an extreme amount of studying. The fact that she gets a B in a 7-hour course does not prove she can work. Ms. Mott stated that, if she were not permitted to rest and were required to attend class from 8:00 A.M. to 5:00 P.M., she would not have completed the course.

The Exhibits on file shed additional light. The Statement of Paula Sullivan (Exhibit 27) indicates that claimant was basically house-bound during 1980 because of her condition. She now seems "incredible [sic] nervous and edgy, due to her medical limitations." "Now she walks very slowly and methodically, as if she is afraid of losing her balance, falling down and walking into something."

Ms. Yuckert's treating physician is Matthew L. Wong. He states that "since January, 1980 [she] has been incapacitated . . . I feel that Mrs. Yuckert has labyrinthine dysfunction bilaterally. It is incapacitating and is not controllable with medication at the present time. As this is bilateral, I do not feel that there is any surgical procedure that will be indicated. I feel that Mrs. Yuckert will be disabled for an indefinite period of time to the best of my estimate." (Exhibit 21: 17 October 1980). On another oc-

casion he emphasized that "*since January, 1980 [she] has been incapacitated.*" (Exhibit 21: 7 January 1981) Contrary to the statement on page 3 of the decision, Dr. Wong describes a medical condition.

Finally, claimant's counsellor at the Division of Rehabilitation confirms the incredible effort she is making when she attends school. (Exhibit 28) Raymond E. Johnson notes that her eye problems keep her from taking a "normal" course load of 15 credits. He reiterates her testimony of working for 30 minutes and taking a 30-minute break.

In view of the above there is little support for the Administrative Law Judge's statement that claimant is exaggerating the effects of her impairments or appears to be overemphasizing the effects of her impairments on her ability to perform basic functions. The Adminstrative Law Judge points to nothing specific in support of this conclusion. The claimant testified thoroughly and honestly. Her testimony was verified by her sister and by vocational testing. It is also supported by Dr. Wong's letters.

Contrary to the statement on page 3 of the decision, claimant's activities have been more than "somewhat reduced." There is no reason to doubt the testimony of claimant and her sister to the effect that claimant's activities are extremely reduced. It is not true that she is "successfully completing a relatively difficult higher education course," in the sense that she is proceeding at about half the normal pace with several times the normal amount of work. It is only because of Ms. Yuckert's tremendous determination that she is able to accomplish anything at community college.

> Substantial evidence means that a finding is supported by more than a mere scientilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [cite omitted] In applying the substantial evidence test we are obligated

> to look at the record as a whole and not merely at the evidence tending to support a finding. *Walker v. Mathews,* 546 F. 2d 814, 818 (C.A. 9 1976).
>
> . . . in determining whether there is substantial evidence to support the examiner's finding, a reviewing court must consider both evidence that supports and evidence that detracts from, the examiner's conclusion. We cannot affirm the examiner's conclusions simply by isolating a specific quantum of supporting evidence. *Day v. Weinberger,* 522 F.2d 1156, 1156 (C.A. 9 1975).

An impairment is not severe if it does not significantly limit someone's abilities to do basic work activities, such as seeing, walking, standing, lifting, etc. 20 CFR § 404.1521. There is no evidence of record that contradicts the considerable evidence concerning limitations on claimant's abilities to do basic work activities. In view of the evidence of record substantial evidence supports disability.

2. The Administrative Law Judge Committed Errors of Law.

Janet Hart Mott testified in her capacity as an expert and reached the conclusions set forth above. In addition the conclusions of Dr. Wong are included in the record. These conclusions were uncontradicted. The Administrative Law Judge rejected this uncontradicted expert opinion without giving reasons for so doing.

> While such uncontradicted expert opinions on the ultimate issue are not binding on the examiner, 20 C.F.R. § 404.1526, the examiner must, if he rejects them, expressly state clear and convincing reasons for his doing so. *Day v. Weinberger,* 522 F.2d 1156 (C.A. 9 1976); *Walker v. Matthews,* 546 F.2d 814, 818 (C.A. 9, 1976).

The Administrative Law Judge failed to comply with this requirement.

> [T]he opinion of a claimant's treating physician is entitled to great weight, for it reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time. *Vitek v. Finch,* 438 F.2d 1157, 1160 (C.A. 4 1971).

See also *Stamper v. Harris,* 650 F.2d 108 (C.A. 6 1981) and *Allen v. Weinberger,* 5052 F.2d 781 (C.A. 7 1977). In totally ignoring Dr. Wong's conclusions and opinions concerning both disability and medical condition, the Administrative Law Judge failed to comply with this requirement.

CONCLUSION

The provisions of the Social Security Act are remedial and are to be liberally construed as to favor the disabled worker. *Bastien v. Califano,* 572 F.2d 908 (C.A. 2, 1978); *Davidson v. Gardner,* 370 F.2d 803 (C.A. 6, 1976). There is nothing in the record constituting substantial evidence produced by the Secretary which indicates there is some kind of substantial, gainful employment which exists and which claimant is capable of doing. In fact, substantial evidence supports a finding of disability as defined.

In addition, the Administrative Law Judge committed errors of law when he failed to consider all the evidence of record, failed to give reasons for rejecting uncontradicted expert opinion, and failed to consider the opinion of claimant's treating physician. The Appeals Council should reverse the decision and enter an order of disability. In the alternative, the matter should be remanded for additional proceedings.

DATED: April 5, 1982.

Respectfully submitted,

/s/JAMES A. DOUGLAS

James A. Douglas
Attorney for Claimant

GIBBS, DOUGLAS, THEILER,
YAROSHEFSKY & DRACHLER
1613 Smith Tower
Seattle, WA 98104
(206) 623-0900

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

REQUEST FOR REVIEW OF HEARING DECISION/ORDER

Take or mail original and all copies to your local social security office.

CLAIMANT
Janet L. Yuckert

WAGE EARNER (Leave blank if same as above)

SOCIAL SECURITY NUMBER
531-34-8353

SPOUSE'S NAME AND SOCIAL SECURITY NUMBER
(Complete ONLY in Supplemental Security Income Case)

(Check One)
Initial Entitlement ☐
Termination or other Post-Entitlement Action ☐

19

Type Claim (Check ONE)

Retirement or Survivors	Only	☐ (RSI)
Disability, Worker or Child	Only	☒ (DIWC)
Disability, Widow or Widower	Only	☐ (DIWW)
Health Insurance, Part A	Only	☐ (HIA)
SSI, Aged	Only ☐ (SSIA)	With Title II Claim ☐ (SSAC)
SSI, Blind	Only ☐ (SSIB)	With Title II Claim ☐ (SSBC)
SSI, Disability	Only ☐ (SSID)	With Title II Claim ☐ (SSDC)

Other (Specify)

I disagree with the action taken on the above claim and request review of such action by the Appeals Council, of the Office of Hearings and Appeals. My reasons for disagreement are:

The ALJ committed errors of law. Substantial evidence supports a finding of disability.

ADDITIONAL EVIDENCE
Any additional evidence which you wish to submit must be either attached to this form or forwarded within 15 days to the Appeals Council at the address shown below. Where the evidence is not submitted within 15 days of this date, or within any extension of time granted by the Appeals Council, the Council will proceed to take its action based on the evidence of record.

Signed by: (Either the claimant or representative should sign - Enter addresses for both)

SIGNATURE OR NAME OF CLAIMANT'S REPRESENTATIVE
James A. Douglas
☒ ATTORNEY ☐ NON-ATTORNEY

CLAIMANT'S SIGNATURE

STREET ADDRESS
1613 Smith Tower

STREET ADDRESS
13725 56th Ave. So. #207

CITY, STATE, AND ZIP CODE
Seattle, WA 98104

CITY, STATE, AND ZIP CODE
Seattle, WA 98168

TELEPHONE NUMBER
(206) 623-0900

DATE
January 20, 1982

Claimant should not fill in below this line

TELEPHONE NUMBER

TO BE COMPLETED BY SOCIAL SECURITY ADMINISTRATION

Is this request filed timely? ☐ Yes ☐ No
If "NO" is checked: (1) attach claimant's explanation for delay; (2) attach any pertinent letter, material or information in Social Security Office.

ACKNOWLEDGMENT OF RECEIPT OF REQUEST FOR REVIEW OF HEARING DECISION/ORDER

Request for Review of Hearing Decision/Order in this case was filed on 1-20-82 at Washington, D.C.

The APPEALS COUNCIL will notify you of its action on your request.

For The Social Security Administration

BY (Signature)

(Title)

(Street Address)

(City) (State) (ZIP Code)

Appeals Council
Office of Hearings and Appeals, SSA
P.O. Box 2518
Washington, D.C. 20013

JAN 22 1982

HA-520-U6 (7-81) Destroy all stock

APPEALS COUNCIL – FILE IN CLAIM FILE

18

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DISABILITY DETERMINATION AND TRANSMITTAL

1. DESTINATION	2. DDS CODE	3. FILING DATE	4. SSN
DDS [XX] BOI [ ] CRS [ ] OIO [ ]	191	10/23/80	531-34-8353 90

5. NAME AND ADDRESS OF CLAIMANT
Janet J Yuckert
Apt D207
13725 56 Ave S
Seattle Wa 98168

6. WE'S NAME (If CDB or DWB Claim)

7. TYPE CLAIM (Title II)
DIB [XX] FZ [ ] DWB [ ] CDB-R [ ] CDB-D [ ] RD-R [ ] RD-D [ ] RD [ ] P-R [ ] P-D [ ]

8. TYPE CLAIM (Title XVI)
DI [ ] DS [ ] DC [ ] BI [ ] BS [ ] BC [ ]

9. DATE OF BIRTH	10. PRIOR ACTION	11. REMARKS
06/08/36	[ ] PD [ ] PT	CONCURRENT TITLE II -TITLE ~~XVI~~ CLAIM -

12. DISTRICT-BRANCH OFFICE ADDRESS	DO-BO CODE	13. DO-BO REPRESENTATIVE	14. DATE
P. O. Box 1037 Renton Wa 98055	191	206-242-6694 Joe Arnold 442-0570	11/04/80

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED
A [ ] DISABILITY BEGAN _____ B [ ] DISABILITY CEASED _____

16. DIAGNOSIS
Labyrinthine

17. RE-EXAM
[ ] NONE
[ ] _____ (Date)

18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A [ ] NOT DISAB. FOR CASH BENE. PURP. B [ ] DISAB. FOR CASH BENE. PURP. BEG. _____

19. CLAIMANT NOT DISABLED
A [X] THROUGH DATE OF CURRENT DETERMINATION B [ ] THROUGH _____ C [ ] BEFORE AGE 22 (CDB Only)

20. VOCATIONAL BACKGROUND	OCC. YRS.	ED. YRS.	21. VR ACTION
Travel Agent - Travel Agency	15 ~~14~~	14	SC. IN A [ ] SC. OUT B [X] PREV. REF. C [ ]

22. REG.-BASIS CODE	23. MED. LIST. NO.	24. MOB. CODE	25. REVISED DET.	26. LIST NO.
~~N31.8e2(b)~~ BJ-1502(b)		G	[ ]	

27. RATIONALE
~~SEE SSA-831 for DIB claim on SSN 531-34-8353~~
Public Health Service Hospital report covering 2-28-80 through 11-19-80 - Ex. 22
Robert Pearlman, M.D. report dated 9-18-80 - Ex. 17
Harborview Medical Center report covering 6-17-80 to 9-2-80 - Ex. 18
Marsha Frettwell, M.D. report dated 10-9-80 - Ex. 20
Matthew L. Wong, M.D. report dated 10-17-80 - Ex. 21

[X] SEE ATTACHED SSA-834

BJA:kmhs 12-3-80

28.
A [ ] PERIOD OF DISABILITY B [ ] DISABILITY PERIOD
C [ ] ESTAB. BEG. _____ AND D [ ] CONTINUES
E [ ] TERM. _____

29. LTR./PAR. NO.

30. DISABILITY EXAMINER-DDS	31. DATE
Bobbie J Anderson	11/26/80
32. REVIEW PHYSICIAN-DDS	33. DATE
	12-2-80

34. REMARKS
Speci[illegible]

EXHIBIT 3 (2pp)

35. BASIS CODE	36. REV. DET. CODES	37. SSA REPRESENTATIVE	SECTION	38. DATE
	—			

FORM SSA-831 U5 (5-78) (FORMERLY SSA-831)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

EXHIBIT NO. 31 FOLDER COPY

19

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration

CONTINUATION SHEET
FOR DISABILITY DETERMINATION

CONTINUATION OF RATIONALE OF SSA-831 OR SSA-833 — 91

NAME OF CLAIMANT	WE'S NAME (If CDB or DWB Claim)	SSN	TYPE OF CLAIM
Janet J. Yuckert		531-34-8352	DIB

Finding of Fact -

The severity of the individual's impairment does not meet or equal that of any impairment described in the Listing of Impairments.

Finding of Fact - Residual Functional Capacity

Medical evidence shows that claimant has a history of dizziness and headaches. Evidence shows that claimant has the ability to hear normal speech. Neurological examination was within normal limits. The evidence shows that claimant had a favourable response to medication. ~~The residual functional capacity to~~ Claimant would have the residual functional capacity to perform work activity involving a reasonable capacity for standing, ~~waking~~ walking, lifting, handling, seeing, hearing, communicating, understanding and following simple instructions.

Finding of Fact - Work Experience

The evidence in the file shows that claimant has worked for 15 years as an agent for a travel agency. This is described by the claimant as sedentary work activity.

Conclusion -

The evidence in the file shows that claimant does have some dizziness and headaches without neurological deficits. She would have the residual functional capacity to perform her customary work activity as a travel agent. Accordingly, she is found not disabled.

(INITIAL AND DATE)

DISABILITY EXAMINER DDS	DATE	REVIEW PHYSICIAN DDS	DATE	DISABILITY EXAMINER	DATE	DISABILITY EXAMINER SSA	DATE
BJM	11/26/80		12-2-80				

Form SSA-834-U5 (8-80) (FORMERLY SSA-834)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED — 1-FOLDER COPY

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DISABILITY DETERMINATION AND TRANSMITTAL

1. DESTINATION	2. DDS CODE	3. FILING DATE	4. SSN
DDS [XXX] BDI [ ] CRS [ ] DIO [ ]	191	10-23-80	531-34-8353 92

5. NAME AND ADDRESS OF CLAIMANT

Janet J. Yuckert
Apt. D207
13725 56 Ave S
Seattle WA 98168

6. WE'S NAME (*II CDB or DWB Claim*)

7. TYPE CLAIM (Title II)
DIB [ ] FZ [ ] DWB [ ] CDB-R [ ] CDB-D [ ] RD-R [ ] RD-D [ ] RD [ ] P-R [ ] P-D [ ]

8. TYPE CLAIM (Title XVI)
DI [XXX] DS [ ] DC [ ] BI [ ] BS [ ] BC [ ]

9. DATE OF BIRTH	10. PRIOR ACTION	11. REMARKS
6-8-36	[ ] PD [ ] PT	Concurrent Title II XVI Claim

12. DISTRICT-BRANCH OFFICE ADDRESS	DO-BO CODE	13. DO-BO REPRESENTATIVE	14. DATE
PO Box 1037 Renton WA 98055	191	Judith M. Pace	11-4-80

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED
A. [ ] DISABILITY BEGAN _____ B. [ ] DISABILITY CEASED _____

16. DIAGNOSIS
Labyrinthine

17. RE-EXAM
[ ] NONE
[ ] _____ (*Date*)

18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A. [ ] NOT DISAB. FOR CASH BENE. PURP. B. [ ] DISAB. FOR CASH BENE. PURP. BEG. _____

19. CLAIMANT NOT DISABLED
A. [X] THROUGH DATE OF CURRENT DETERMINATION B. [ ] THROUGH _____ C. [ ] BEFORE AGE 22 (*CDB Only*)

20. VOCATIONAL BACKGROUND	OCC. YRS.	ED. YRS.	21. VR ACTION
Travel Agent - Travel Agency	15	14	SC. IN A. [ ] SC. OUT B. [X] PREV. REF. C. [ ]

22. REG.-BASIS CODE	23. MED. LIST. NO.	24. MOB. CODE	25. REVISED DET.	26. LIST NO.
N31-902(b)		G	[ ]	

27. RATIONALE

SEE SSA 831 for DIB claim on SSN 531-34-8353 -Ex. 3

[ ] SEE ATTACHED SSA-834 BJA:kmhs 12-3-80

28.
A. [ ] PERIOD OF DISABILITY B. [ ] DISABILITY PERIOD
C. [ ] ESTAB. BEG. _____ AND D. [ ] CONTINUES
E. [ ] TERM. _____

29. LTR./PAR. NO.

30. DISABILITY EXAMINER-DDS: Bobbie Henderson — 31. DATE: 11/26/80

32. REVIEW PHYSICIAN-DDS: [signature] — 33. DATE: 12-2-80

34. REMARKS

EXHIBIT 4

35. BASIS CODE	36. REV. DET. CODES	37. SSA REPRESENTATIVE	SECTION	38. DATE
	___ ___			

FORM SSA-831 U5 (5-78) (FORMERLY SSA-831)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

1 - FOLDER COPY

EXHIBIT NO. 4

21

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

TOE 710

Form Approved
OMB No. 72-R0552

REQUEST FOR RECONSIDERATION

(Do not write in this space)
T
1 | 5 | 8
93
Renton

NAME OF CLAIMANT	NAME OF WAGE EARNER OR SELF-EMPLOYED PERSON (If different from claimant.)
Janet Yuckert	
SOCIAL SECURITY CLAIM NUMBER	SUPPLEMENTAL SECURITY INCOME CLAIM NUMBER
531-34-8353	531-34-8353

SPOUSE'S NAME AND SOCIAL SECURITY NUMBER (Complete ONLY in Supplemental Security Income Case)

CLAIM FOR (Specify type, e.g., retirement, disability, hospital insurance, supplemental security income, etc.) disability - 551/55A

I do not agree with the determination made on the above claim and request reconsideration.

My reasons are: I do not feel that I am able to work. I cannot see safely due to my eye. I cannot read because of the focus problem

NOTE: If the notice of the determination on your claim is dated more than 65 days ago, include your reason for not making this request earlier. Include the date on which you received the notice of the determination.

I am submitting the following additional evidence (If none, write "None,"):

11/07/81 letter for all Wong
My statement

Signature (First name, middle initial, last name) (Write in ink)

SIGN HERE X Janet J. Yuckert

Date (Month, day, year) 11/13/81

Telephone Number 242-6694

Mailing Address (Number and street, Apt. No., P.O. Box, or Rural Route) Apt # 207 13735 56 - Ave S

City and State Seattle Wa

ZIP Code 98168

Enter Name of County (if any) in which you now liv King

Witnesses are required ONLY if this request has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the person requesting reconsideration must sign below, giving their full address

1. Signature of Witness	2. Signature of Witness
Address (Number and street, City, State, ZIP Code)	Address (Number and street, City, State, ZIP Code)

FOR SOCIAL SECURITY OFFICE USE ONLY

SOCIAL SECURITY OFFICE ADDRESS

EXHIBIT 5

ROUTING INSTRUCTIONS (Check one)

- ☐ State Agency (Route with disability folder)
- ☐ Program Service Center
- ☐ BDI, Balto.
- ☐ District Office Reconsideration
- ☐ Division of International Operations, Balto.
- ☐ BDP, Attn: ACB, Balto.

FORM SSA-561-U2 (11-77) (FORMERLY SSA-561)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

NOTE: Take or mail completed copies to your Social Security Office.

EXHIBIT NO. 5

22

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DISABILITY DETERMINATION AND TRANSMITTAL

1. DESTINATION	2. DDS CODE	3. FILING DATE	4. SSN
DDS ☐ BDI ☐ CAS ☐ DIO ☐	500	10/23/80	531-34-8353 94

5. NAME AND ADDRESS OF CLAIMANT

Janet J. Yuckert
Apt. D207
13725 56 Ave S
Seattle WA 98168

6. WE'S NAME *(If CDB or DWB Claim)*

7. TYPE CLAIM (Title II)
DIB [XX] FZ ☐ DWB ☐ CDB-R ☐ CDB-D ☐ RD-R ☐ RD-D ☐ RD ☐ P-R ☐ P-D ☐

8. TYPE CLAIM (Title XVI)
DI ☐ DS ☐ DC ☐ BI ☐ BS ☐ BC ☐

9. DATE OF BIRTH	10. PRIOR ACTION	11. REMARKS
06/08/36	[X] PD ☐ PT	Recon claim filed 01/13/81 Concurrent Title II/Title XVI Claims

12. DISTRICT-BRANCH OFFICE ADDRESS	DO-BO CODE	13. DO-BO REPRESENTATIVE	14. DATE
P O Box 1037 Renton WA 98055	191		

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED
A ☐ DISABILITY BEGAN _____ B ☐ DISABILITY CEASED _____

16. DIAGNOSIS
Labyrinthine disorder

17. RE-EXAM
☐ NONE
☐ _____ *(Date)*

18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A ☐ NOT DISAB. FOR CASH BENE. PURP. B ☐ DISAB. FOR CASH BENE. PURP. BEG. _____

19. CLAIMANT NOT DISABLED
A [XX] THROUGH DATE OF CURRENT DETERMINATION B ☐ THROUGH _____ C ☐ BEFORE AGE 22 *(CDB Only)*

20. VOCATIONAL BACKGROUND	OCC. YRS.	ED. YRS.	21. VR ACTION
Travel Agent-Travel Agency	15	14	SC. IN A ☐ SC. OUT B [X] PREV. REF. C ☐

22. REG.-BASIS CODE	23. MED. LIST. NO.	24. MOB. CODE	25. REVISED DET.	26. LIST NO.
H1-1502(b)		G	[X]	

27. RATIONALE
The statement of evidence in the determination of 12/03/80, except as modified herein, is hereby incorporated by reference but not the inferences, findings, or conclusions thereon. - Ex. 3
Matthew L. Wong, MD report of 01/07/81 - Ex. 23
Division of Vocational Rehabilitation, medical & social information of 02/26/80 - 12/03/80 - Ex. 19

[X] SEE ATTACHED SSA-834 LL:eh 1/28/81

28.
A ☐ PERIOD OF DISABILITY B ☐ DISABILITY PERIOD
C ☐ ESTAB. BEG. _____ AND D ☐ CONTINUES
E ☐ TERM. _____

29. LTR./PAR. NO.

30. DISABILITY EXAMINER-DDS	31. DATE
[signature]	1/23/81
32. REVIEW PHYSICIAN-DDS	**33. DATE**
[signature] MD	1/26/81

23

34. REMARKS
Recon Affirmation

EXHIBIT 6 (2pp) DDS QAME/5

35. BASIS CODE	36. REV. DET. CODES	37. SSA REPRESENTATIVE	SECTION	38. DATE
H1	D — 4	[signature]	DATB	2/6/81

FORM SSA-831 U5 (5-78) (FORMERLY SSA-831)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

1 - FOLDER COPY

EXHIBIT NO. 6 (2 Pgs)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

CONTINUATION SHEET FOR DISABILITY DETERMINATION

CONTINUATION OF RATIONALE OF SSA-831 OR SSA-833			95
NAME OF CLAIMANT	WE'S NAME (If CDB or DWB Claim)	SSN	TYPE OF CLAIM
Janet J. Yuckert		531-34-8352	DIB

A finding of fact: The severity of the individual's impairment(s) does not meet or equal that of any impairment described in the Listing of Impairments.

Finding of Fact-RFC

Medical evidence shows that claimant has a history of dizziness and headaches. Evidence shows that claimant has the ability to hear normal speech. Neurological examination was within normal limits. The evidence shows that claimant had a favorable response to medication. Claimant would have the residual functional capacity to perform work activity involving a reasonable capacity for standing, walking, lifting, handling, seeing, hearing, communicating, understanding and following simple instructions.

Finding of Fact-Work Experience

The evidence in the file shows that claimant has worked for 15 years as an agent for a travel agency. This is described by the claimant as a sedentery work activity.

Conclusion

The evidence in the file shows that claimant does have some dizziness and headache without neurological deficits. She would have the residual functional capacity to perform her customary fwork activity as a travel agent. Accordingly, she is found not disabled.

24

(INITIAL AND DATE)

DISABILITY EXAMINER DDS	DATE	REVIEW PHYSICIAN DDS	DATE	DISABILITY EXAMINER SDI	DATE	DISABILITY EXAMINER SDI	DATE
[illegible]	1/23/81	[illegible]	1/26/81			[illegible]	2/6/81

FORM SSA-834-U5 (10 77) (FORMERLY SSA-834)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

1-FOLDER COPY

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

DISABILITY DETERMINATION AND TRANSMITTAL

1. DESTINATION	2. DDS CODE	3. FILING DATE	4. SSN
DDS ☐ BDI ☐ CRS ☐ DIO ☐	500	10/23/80	531-34-8353 96

5. NAME AND ADDRESS OF CLAIMANT

Janet J. Yuckert
Apt. D207
13725 56 Ave S
Seattle WA 98168

6. WE'S NAME *(If CDB or DWB Claim)*

7. TYPE CLAIM (Title II)
DIB ☐ FZ ☐ DWB ☐ CDB-R ☐ CDB-D ☐ RD-R ☐ RD-D ☐ RD ☐ P-R ☐ P-D ☐

8. TYPE CLAIM (Title XVI)
DI ☒ DS ☐ DC ☐ BI ☐ BS ☐ BC ☐

9. DATE OF BIRTH	10. PRIOR ACTION	11. REMARKS
06/08/36	☒ PD ☐ PT	Recon Affi Claim filed 1/13/81 Concurrent Title II/Title XVI Claims

12. DISTRICT-BRANCH OFFICE ADDRESS	DO-BO CODE	13. DO-BO REPRESENTATIVE	14. DATE
P O Box 1037 Renton WA 98055	191		

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

15. CLAIMANT DISABLED
A ☐ DISABILITY BEGAN _____ B ☐ DISABILITY CEASED _____

16. DIAGNOSIS
Labyrinthine disorder

17. RE-EXAM
☐ NONE
☐ _____ *(Date)*

18. CASE OF BLINDNESS AS DEFINED IN SEC. 1614(a)(2)/216(i)
A ☐ NOT DISAB. FOR CASH BENE. PURP. B ☐ DISAB. FOR CASH BENE. PURP. BEG. _____

19. CLAIMANT NOT DISABLED
A ☒ THROUGH DATE OF CURRENT DETERMINATION B ☐ THROUGH _____ C ☐ BEFORE AGE 22 *(CDB Only)*

20. VOCATIONAL BACKGROUND	OCC. YRS.	ED. YRS.	21. VR ACTION
Travel Agent-Travel Agency	15	14	SC. IN A ☐ SC. OUT B ☒ PREV. REF. C ☐

22. REG.-BASIS CODE	23. MED. LIST. NO.	24. MOB. CODE	25. REVISED DET.	26. LIST NO.
N31-902(b)		G	☒	

27. RATIONALE
See SSA-831 for DIB Recon claim on SSN 531-34-8353.

→ 1/28/81

☐ SEE ATTACHED SSA-834 LL:eh

28.
A ☐ PERIOD OF DISABILITY B ☐ DISABILITY PERIOD
C ☐ ESTAB. BEG. _____ AND D ☐ CONTINUES
E ☐ TERM. _____

29. LTR./PAR. NO. 812 153 841

30. DISABILITY EXAMINER-DDS	31. DATE
Rueben Lund	1/23/81
32. REVIEW PHYSICIAN-DDS	**33. DATE**
John Fulton MD	1/26/81

34. REMARKS
Recon Affirmation

TAR

EXHIBIT 7 (2 pp) DDS QAMC 5

35. BASIS CODE	36. REV. DET. CODES	37. SSA REPRESENTATIVE	SECTION	38. DATE
N31	D — 4	D Davis	DAB.	2/6/81

FORM SSA-831 U5 (5-78) (FORMERLY SSA-831)
PRIOR EDITIONS MAY BE USED UNTIL SUPPLY IS EXHAUSTED

1 - FOLDER NUMBER

EXHIBIT NO. 7 (2 pgs)

25

Supplemental Security Income
Notice of Reconsideration

98

From Department of Health, Education, and Welfare
Social Security Administration

Janet J. Yuckert
Apt. D207
13725 56th Ave. S.
Seattle, Wa. 98168

Date: FEB 10 1981

Social Security Number:
531-34-8353
Reconsideration Filed: 1/13/81

As you requested, your claim for supplemental security income checks has been thoroughly reexamined.

To get supplemental security income disability payments, you must be unable to do any substantial gainful work because of a medical condition which has lasted or will last at least 12 months in row. Your age, education, training and past work experience are also considered in this decision.

We have just finished another careful review of your case. We looked again at all your medical records and considered everything you told us about your condition. The evidence in your case shows you still do not meet the disability requirements of the law. Because of this, supplemental security income payments cannot be sent to you.

Although you are not eligible for Supplemental Security Income payments, you may be eligible for medical assistance (Medicaid). If you have any questions about eligibility for Medicaid or need medical assistance, you should get in touch with the local office of the Department of Social and Health Services.

This decision refers only to your claim for Supplemental Security Income payments. Any decision about your benefits under the Social Security Disability Insurance program will be sent to you in a separate notice.

EXHIBIT NO. 8 (2pp)
191

Important: See other side for an explanation of your appeal rights and other information ▶

Form SSA-L8455-U2 (6-78) (Formerly SSA-8455A)
Prior editions may be used until supply is exhausted

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

REQUEST FOR HEARING

Renton, Washington
MAR 25 1981

Take or Mail original and all copies to your local Social Security Office.

CLAIMANT
Janet J. Wuckert

WAGE EARNER *(Leave blank if same as above)*

SOCIAL SECURITY NUMBER
531-34-8353

SPOUSE'S NAME AND SOCIAL SECURITY NUMBER
(Complete ONLY in Supplemental Security Income Case)

(Check One)
Initial Entitlement ☒ SSA BR.
Termination or other Post-Entitlement Action ☐

Type Claim (Check ONE) 100

Retirement or Survivors	Only	☐ (RSI)
Disability, Worker or Child	Only	☐ (DIWC)
Disability, Widow or Widower	Only	☐ (DIWW)
SSI, Aged	Only ☐ (SSIA)	With Title II Claim ☐ (SSAC)
SSI, Blind	Only ☐ (SSIB)	With Title II Claim ☐ (SSBC)
SSI, Disability-Only	☒ (SSID)	With Title II Claim ☒ (SSDC)

Other (Specify)

I disagree with the determination made on the above claim and request a hearing. My reasons for disagreement are:

My disability is never enough that I can't work the work.

APR 8 1981
SEATTLE OHA

Check one of the following:

☒ I have additional evidence to submit (Attach such evidence to this form or forward to the Social Security Office within 10 days.)

☐ I have no additional evidence to submit.

Check ONLY ONE of the statements below:

☒ I wish to appear in person.

☐ I do not wish to appear at a hearing. I request that a decision be made on the basis of the evidence in my case.

Signed by: (Either the claimant or representative should sign. Enter addresses for both. If claimant's representative is not an attorney, complete Form SSA-1696.)

SIGNATURE OR NAME OF CLAIMANT'S REPRESENTATIVE	CLAIMANT'S SIGNATURE
☐ ATTORNEY ☐ NON ATTORNEY	x Janet J. Wuckert
ADDRESS	ADDRESS 13725 - SE 176th St. #D207
CITY, STATE, AND ZIP CODE	CITY, STATE, AND ZIP CODE Seattle Wa. 98168
TELEPHONE NUMBER	TELEPHONE NUMBER 206-242-6694

DATE: 3/17/81
(Claimant should not fill in below this line)

TO BE COMPLETED BY SOCIAL SECURITY ADMINISTRATION

Is this request timely filed? ☒ YES ☐ NO

If "No" is checked: (1) Attach claimant's explanation for delay, (2) Attach any pertinent letter, material, or information in the Social Security Office.

Interpreter Needed _____ (Language)

ACKNOWLEDGMENT OF REQUEST FOR HEARING

This request for hearing was filed on 3/25/81 at Renton Wa

The Administrative Law Judge will notify you of the time and place of the hearing at least 10 days in advance of the hearing.

HEARING OFFICE COPY

TO:
☒ Hearing Office 67 Seattle Wa (Location)
☐ _____ (Location) (Claims involving SSI or combined SSI-RSDI)
☐ Supplemental Security Income File Attached

CLAIM FILE COPY

TO:
☐ Hearing Office
☐ Claim File(s) Requested by Teletype to _____ (Location)
☐ ACB (BDP)

For the Social Security Administration:

By: M. Crowell (Signature)
cc EXHIBIT 9 (3pp)
(Title)
Bx 1037
(Street Address)
Renton Wa 98057
(City, State, and Zip Code)

Servicing Social Security Office Code 191

Form HA-501 (2-77)

CLAIM FILE

EXHIBIT NO. 9 (2pp)

27

CLAIMANT'S STATEMENT WHEN REQUEST FOR HEARING IS FILED AND THE ISSUE IS DISABILITY

PLEASE READ PRIVACY ACT STATEMENT ON REVERSE: Print, type, or write clearly and answer all questions to the best of your ability. (If you are filing on behalf of someone else, also answer all questions to the best of your ability.) Complete answers will aid in processing the claim. IF ADDITIONAL SPACE IS NEEDED, ATTACH A SEPARATE STATEMENT TO THIS FORM.

APR 2 1981 SSA BRANCH OFFICE 1:31 Washington 101

CLAIMANT'S NAME	SOCIAL SECURITY NUMBER
JANET J YUCKERT	531-34-8353

1. Have you worked since 3-10-81, the date your request for reconsideration was filed? (If yes, describe the nature and extent of work.) ☐ Yes ☒ No

2. Has there been any change in your condition since the above date? (If yes, describe the change.) ☒ Yes ☐ No
VISION HAS BECOME WORSE ACCORDING TO EYE EXAMINATION ON 3/19 BY DR. GOFMAN. DIZZINESS INTENSIFIED.

3. Have your daily activities changed since the above date? (If yes, describe the changes.) ☐ Yes ☒ No

4. Have you been treated or examined by a doctor (other than as a patient in a hospital) since the above date? (If yes, complete the following.) ☒ Yes ☐ No

NAME AND ADDRESS OF DOCTOR(S)	DATE OF EXAM	MEDICAL PROBLEM
DR. JOHN GOFMAN - EYE CLINIC PUBLIC HEALTH SERVICE HOSPITAL 1431-14TH AVE. SO. - SEATTLE, WA. 98114	3-19-81	EYE EXAMINATION DUE TO FOCUS-REFOCUS PROBLEMS WITH VISION

5. Have you been a patient in a hospital since the above date? (If yes, complete the following.) ☐ Yes ☒ No

NAME AND ADDRESS OF HOSPITAL(S)	DATE OF HOSPITALIZATION	MEDICAL PROBLEM

6. Are there community agencies that have medical or vocational records that you did not tell about before? (If yes, list the agencies or employers who have such records.) ☐ Yes ☒ No

7. Are you now taking any prescription drugs or medications? (If yes, list them below.) ☒ Yes ☐ No

NAME OF MEDICATION(S)	DOSAGE BEING TAKEN	NAME OF PHYSICIAN(S)
PREMARIN (EVERY OTHER DAY - 1 THRU 25TH DAY)	.03MG	DR. MICHAEL SMITH
PROVERA (1 PER DAY - 16 THRU 25TH DAY)	10 MG	DR. MICHAEL SMITH

8. Are you now taking any nonprescription drugs or medications? (If yes, list them below.) ☒ Yes ☐ No

NAME OF MEDICATION(S)	DOSAGE BEING TAKEN
EYE DROPS (LIQUID TEARS, VISINE, MURINE)	AS NEEDED TO CLEAR EYES
EXCEDRIN OR TYLENOL EXTRA STRENGTH	AS NEEDED FOR HEADACHES

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal Law, I certify that the above statements are true.

SIGNATURE OF CLAIMANT OR PERSON FILING ON THE CLAIMANT'S BEHALF	DATE SIGNED
SIGN HERE ▶ Janet J. Yuckert	3-31-81

Form HA-4486 (9-80)
Prior editions may be used until supply is exhausted

28

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R1042

VOCATIONAL REPORT

120

This report supplements the Disability Report (Form SSA-3368) by requesting additional information about your past work experience. PLEASE PRINT, TYPE, OR WRITE CLEARLY AND ANSWER ALL ITEMS TO THE BEST OF YOUR ABILITY. If you are filing on behalf of someone else, enter his or her name and social security number in the space provided and answer all questions. COMPLETE ANSWERS WILL AID IN PROCESSING THE CLAIM.

Privacy Act Notice: The information requested on this form is authorized by Title 20 CFR 404.1523 and Title 20 CFR 416.923. The information provided will be used to further document your claim. Information requested on this form is voluntary, but failure to provide all or any part of the requested information may affect the determination of your claim. Information you furnish on this form may be disclosed by the Social Security Administration to another person or governmental agency only with respect to social security programs and to comply with Federal laws requiring the exchange of information between Social Security and another agency.

A. Name of Claimant	B. Social Security Number	C. Telephone number where you can be reached:
JANET J YUCKERT	531-34-8353	242-6694

PART I — INFORMATION ABOUT YOUR WORK HISTORY

1. List the job or jobs you have had in the last 15 years before you stopped working. (If you have a 6th grade education or less, AND performed only heavy unskilled labor for 35 years or more, list the job or jobs you have had *since you began to work. If you need more space, use Part III.)*

	JOB TITLE (Be sure to begin with your usual job)	TYPE OF BUSINESS	DATES WORKED (Month and Year) FROM	DATES WORKED (Month and Year) TO	DAYS PER WEEK	RATE OF PAY (Per hour, day, week, month or year)
1	Real Estate Agent	Residential Sales only one sale	9/78	9/79	varied	—
2						
3	Travel Agent	Travel Agency	1962	7/1977	5	$750/mo.
4						
5						
6						
7						
8						
9						
10						
11						
12						

EXHIBIT 14 (3 pp)

29

Form SSA-3369 F6 (5-79) Prior Editions May Be Used Until Supply Is Exhausted

EXHIBIT NO. 14 (3 pp)

PART II — INFORMATION ABOUT YOUR JOB DUTIES

2. Provide the following information (on pages 2-5) for each of the jobs listed in Part I starting with your usual job. Note: If you listed just one job in Part I, complete only page 2.

Job Title (from Part I):

Travel Agent A

121

A. In your job did you:

- Use machines, tools, or equipment of any kind? ☒ Yes ☐ No
- Use technical knowledge or skills? ☐ Yes ☐ No
- Do any writing, complete reports, or perform similar duties? ☒ Yes ☐ No
- Have supervisory responsibilities? ☐ Yes ☒ No

B. Describe your basic duties (explain what you did and how you did it) below. Also, explain all "Yes" answers by giving a FULL DESCRIPTION of: the types of machines, tools, or equipment you used and the exact operation you performed; the technical knowledge or skills involved; the type of writing you did, and the nature of any reports; and the number of people you supervised and the extent of your supervision:

Tools - typewriters, adding machine, calculators, general office equipment

Learn how to read airline guide - compute airfares with air tariffs + rail

duties - + write airline tickets
put together trips for clients
advising clients on travel

Some instructing of others was necessary on my job

traveled and wrote reports on hotels + tour operators + tourist facilities in the specific assigned areas

C. Describe the kind and amount of physical activity this job involved during a typical day in terms of:

- **Walking** (circle the number of hours a day spent walking) — 0 1 (2 3) 4 5 6 7 8
- **Standing** (circle the number of hours a day spent standing) — 0 1 2 3 4 5 6 7 8
- **Sitting** (circle the number of hours a day spent sitting) — 0 1 2 3 4 (5 6) 7 8
- **Bending** (circle how often a day you had to bend) — Never - Occasionally - (Frequently) - Constantly
- **Reaching** (circle how often a day you had to reach) — Never - Occasionally - (Frequently) - Constantly
- **Lifting and Carrying**: Describe below what kind of objects or material was lifted, how much it weighed, how many times a day you lifted this material, and how far you carried it:

none to speak of - just lifting books

PART III — REMARKS

Use this section for any other information you may want to give about your work history, or to provide any other remarks you may want to make to support your disability claim:

122

(If you need more space, use separate sheets of paper.)

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.

NAME (SIGNATURE OF CLAIMANT OR PERSON FILING ON THE CLAIMANT'S BEHALF)

SIGN HERE ▶ Janet J. Yuckert — DATE 10/23/80

Do not write below this line

SSA-3369 TAKEN BY	FORM SUPPLEMENTED: ☐ YES ☒ NO
☒ PERSONAL INTERVIEW ☐ TELEPHONE ☐ MAIL	If "Yes," by ☐ PERSONAL INTERVIEW ☐ TELEPHONE ☐ MAIL

SIGNATURE OF INTERVIEWER OR REVIEWER	TITLE *(also check office)*	DATE
Joe Arnold	CR ☐ DDS ☐ DO ☒ BO 191	10/23/80

Form SSA-3369 F6 (5-79) — 6 — U.S. Government Printing Office: 1979—281-285/291

31

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No.72-R1047

For SSA Use Only - Do NOT Complete This Item.	
Name of Wage Earner: Janet Yockey	Social Security Number: 123-53-8353
Name of Claimant	Social Security Number
Type of Claim:	

Title II — ☐ Freeze ☒ DIB ☐ DWB ☐ CDB Title XVI — ☒ Disability ☐ Blind ☐ Child

RECONSIDERATION DISABILITY REPORT

PLEASE PRINT, TYPE, OR WRITE CLEARLY AND ANSWER ALL ITEMS TO THE BEST OF YOUR ABILITY. If you are filing on behalf of someone else, answer all questions. COMPLETE ANSWERS WILL AID IN PROCESSING THE CLAIM.

Privacy Act Notice: The information requested on this form is authorized by Title 20 CFR 404.1523 and Title 20 CFR 416.923. The information provided will be used to further document your claim. Information requested on this form is voluntary, but failure to provide all or any part of the requested information may affect the determination of your claim. Information you furnish on this form may be disclosed by the Social Security Administration to another person or governmental agency only with respect to social security programs and to comply with Federal laws requiring the exchange of information between the Social Security Administration and another agency.

PART I — INFORMATION ABOUT YOUR CONDITION

1. Has there been any change (for better or worse) in your illness or injury since you filed your claim? ☒ Yes ☐ No
   If "Yes," describe any changes in your symptoms. I do not feel I can safely operate a vehicle.

2. Describe any physical or mental limitations you have as a result of your condition.
   See above

3. Have any restrictions been placed on you by a physician? ☒ Yes ☒ No
   If "Yes," give name, address, and telephone number of the physician and show what kinds of restrictions have been imposed.

EXHIBIT 15 (6pp)

4. Do you have any additional illness or injury that isn't recorded in the file? ☐ Yes ☒ No
   If "Yes," describe the kind of illness or injury and the date that it occurred.

EXHIBIT NO. 15 (6pp)

32

PART II — INFORMATION ABOUT YOUR MEDICAL RECORDS

5. Have you seen any physician since you filed your claim? ☑ Yes ☐ No
If "Yes," provide the following about the physician you last visited:

NAME	ADDRESS (Include ZIP Code)
Dawlew Wms	Dubbe Heart Hosp 124
AREA CODE AND TELEPHONE NUMBER	
HOW OFTEN DO YOU SEE THIS PHYSICIAN	DATES YOU SAW THIS PHYSICIAN 12/80

REASONS FOR VISITS Tested further info. from him re the denial of my claim.

TYPE OF TREATMENT RECEIVED (Include drugs, surgery, tests)

6. Have you seen any other physician since you filed your claim? ☐ Yes ☑ No
If "Yes," show the following:

NAME	ADDRESS (Include ZIP Code)
AREA CODE AND TELEPHONE NUMBER	
HOW OFTEN DO YOU SEE THIS PHYSICIAN?	DATES YOU SAW THIS PHYSICIAN

REASONS FOR VISITS

TYPE OF TREATMENT RECEIVED (Include drugs, surgery, tests)

If you have seen other physicians since you filed your claim, list their names, addresses, dates and reasons for visits in Part V.

7. Have you been hospitalized, or treated at a clinic or confined in a nursing home or extended care facility for your illness or injury since you filed your claim? ☐ Yes ☑ No
If "Yes," show the following:

NAME OF FACILITY	ADDRESS OF AGENCY (Include ZIP Code)
PATIENT OR CLINIC NUMBER	
WERE YOU AN INPATIENT? (Stayed at least overnight) ☐ Yes ☐ No IF "YES," SHOW →	DATES OF ADMISSIONS AND DISCHARGES
WERE YOU AN OUTPATIENT? ☐ Yes ☐ No IF "YES," SHOW →	DATES OF VISITS

REASON FOR HOSPITALIZATION, CLINIC VISITS, OR CONFINEMENT

TYPE OF TREATMENT RECEIVED (Include drugs, surgery, tests)

If you have been in other hospitals, clinics, nursing homes, or extended care facilities for your illness or injury, list the names, addresses, patient or clinic numbers, dates and reasons for hospitalization, clinic visits, or confinement in Part V.

8. Have you been seen by other agencies for your injury or illness? ☑ Yes ☐ No
(VA, Workmen's Compensation, Vocational Rehabilitation, Welfare, Special Schools, Unions, etc.)
If "Yes," show the following:

NAME OF AGENCY	ADDRESS OF AGENCY (Including ZIP Code)
VOC REH	Burien.
YOUR CLAIM NUMBER EXHIBIT	
DATES OF VISITS	NAME OF COUNSELOR, SOCIAL WORKER, ETC. Kay Johnson

TYPE OF TREATMENT OR EXAMINATION RECEIVED (Include drugs, surgery, tests)
Evaluation - am attending Highline - take 4 classes

If more space is needed, list the other agencies, their addresses, your claim numbers, dates, and treatment received in Part V.

33

PART III — INFORMATION ABOUT WORK

9. Have you worked since you filed your claim? ☐ Yes ☒ No

If "Yes," you will be asked to give details on a separate form.

125

PART IV — INFORMATION ABOUT YOUR ACTIVITIES

10. How does your illness or injury affect your ability to care for your personal needs?

I am unable to drive my car. I can't read. Can take care of personal needs however I must have help to cook, clean, shop etc. as my balance is so bad.

11. What changes have occurred in your daily activities since you filed your claim? (If none, show, "None")

I began school ~~three~~ last fall the first part of this month. I am taking Art, Stress Mgmt, Algebra, Data Processing for a total of 15 hrs. I am having problems with the reading & have fallen behind.

PART V — REMARKS AND AUTHORIZATIONS

12.(a) READ CAREFULLY: I authorize the Social Security Administration to release information from my records, as necessary to process my claim, as follows:

Copies of my medical records may be furnished to a physician or a medical institution for background information if it is necessary for me to have a medical examination by that physician or medical institution. The results of any such examination may be given to my personal physician.

Information from my records may also be furnished, if necessary, to any company providing clerical and administrative services for the purposes of transcribing, typing, copying or otherwise clerically servicing such information. The State Vocational Rehabilitation Agency may also have access to information in my records to determine my eligibility for rehabilitative services.

I understand and concur with the statement and authorizations given above, except as follows (If there are no exceptions, write "None" in the space below. If you do not concur with any part of the above statement, state your objections clearly):

12. (b)	Telephone number where you can be reached:	Best time to reach you:
	243-6694	Early AM

12(b) Use this section to continue information required by prior sections. Identify the section for which the information is provided.
Note: This section may also be used for any special or additional information which you wish to be recorded

126

Biggest problem is usual. I cannot read due to problem w/ focus. It takes 3-4 hrs to read a single magazine page. I have to work to focus on each separate word. I was seen by an opthomologist at PHS - he said he could tell I had a problem in this area but it was a rather different area to document - he is to see me Feb 5 for further tests.

35

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal Law, I certify that the above statements are true.

NAME (SIGNATURE OF CLAIMANT OR PERSON FILING ON THE CLAIMANT'S BEHALF)

SIGN HERE ✍ Janet J. Yuckert

DATE 1/13/81

PART VI — FOR SSA USE ONLY — DO NOT WRITE BELOW THIS LINE

Name of Wage Earner	Social Security Number
Janet Yuedert	531-34-8353
Name of Claimant	**Social Security Number**
321	127

13. Check each item to indicate whether or not any difficulty was observed:
(Explain all items checked "Yes," in Item 14 below)

Reading:	☑ Yes	☐ No	Using Hands:	☐ Yes	☑ No
Writing:	☐ Yes	☑ No	Breathing:	☐ Yes	☑ No
Answering:	☑ Yes	☐ No	Seeing:	☐ Yes	☑ No
Hearing:	☐ Yes	☑ No	Walking:	☑ Yes	☐ No
Speaking:	☐ Yes	☑ No	Sitting	☐ Yes	☑ No
Understanding:	☐ Yes	☑ No	Assistive Devices:	☐ Yes	☑ No

Other *(Specify)*: _____

14. If any of the above items were checked "Yes," describe the observed difficulty: Janet did not read or complete any forms. She asked for assistance. She was very hard to pin down regarding her condition but she has alot of mobility within a few feet she seemed to want to deny the severity

15. Describe fully: General appearance, behavior, any unusual observed difficulties not noted elsewhere, any unusual circumstances surrounding the interviews. Med built woman cried as she spoke, would not give a totally straight answer. Clean neatly dressed - took bus to office but was to have a side kick.

16. Claimant requires assistance ..... ☐ Yes ☑ No
If "Yes," show name, address, phone number, and relationship of interested person.
Also show why claimant requires assistance (foreign-speaking, unable to ambulate, etc.)

128

17. Capability development appears needed ..... ☐ Yes ☑ No
If "Yes," indicate whether DO will undertake development because it is also developing medical evidence from a special arrangement source. (Show name and address of source.)

18. Is development of work activity necessary? ..... ☐ Yes ☑ No
If "Yes," is an SSA-821 or SSA-821B ☐ Pending ☐ In File

19. SSA-3441 Taken By:
☑ Personal Interview
☐ DO/BO ☐ Home ☐ Other _____
☐ Telephone
☐ Mail

Signature of Interviewer or Reviewer	Title	DO, BO, or TSC	Date
[signature]	CR	Lentz	1/13/81

37

STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

P.O. Box 9303 LN-11, Olympia, Washington 98504

November 10, 1980

132

2/26/80 to 3/19/80

Robert Pearlman, M.D.
Valley Community Clinic
110 Williams Avenue South
Renton, WA 98055

Re: Janet J. Yuckert
A/N 531-34-8353
DB: 06/08/36 BJA: 1c #16

Dear Doctor

We are responsible for evaluating a disability claim under the Social Security Act. Inability to work is alleged on the basis of Severe Low Digestion, Back Pain, Nerve problems

In order to make a decision, we need specific objective findings from your records. Please include in your report the following:

- ✓ 1. History and Physical Examination Findings from 2-80 to date last seen
- ✓ 2. Range of Motion in Degrees
- ✓ 3. X-ray of Area Involved
- ✓ 4. Neurological Findings
- ___ 5. Description of Chest Pain
- ___ 6. Copies of EKG Tracings
- ___ 7. Chest X-ray
- ___ 8. Pulmonary Function Studies
- ___ 9. Spirometric Tracings
- ___ 10. Pathology Report
- ___ 11. Evidence of Metastases
- ___ 12. Frequency of Seizures / Dilantin level
- ___ 13. EEG Report
- ✓ 14. Visual Fields & Acuity with Correction
- ✓ 15. Audiometric Findings
- ___ 16. Psychometric Tests
- ___ 17. Capability to Handle Funds
- ✓ 18. Current Mental Status Exam (form encl.)
- ✓ 19. Pertinent Lab Work
- ___ 20. Prognosis
- ___ Other: _____

TELEPHONE REPORTS ARE PREFERRED. SEE THE REVERSE SIDE FOR INSTRUCTIONS. You may also reply on the enclosed form or submit a copy of your records.

___ Supplemental Security Income or Medical Assistance Regulations allow us to pay up to $15 for a complete report. Enclosed is a voucher for your signature.

___ Social Security Regulations state the claimant must pay for the report.

Your patient will benefit by your prompt reply. A medical release form is enclosed.

Sincerely,

Edith J. Anderson

D.I. Adjudicator
Extension Number 954-4177
Social Security Disability Insurance

DSHS 14-126(3/78)
LI

EXHIBIT 17 (3pp)

EXHIBIT NO. 17 (3pp)

NOTICE TO PHYSICIAN:
PLEASE INCLUDE SUFFICIENT DETAILS OF HISTORY, PHYSICAL AND DIAGNOSTIC FINDINGS CLINICAL COURSE, THERAPY AND RESPONSE TO ENABLE A REVIEWING PHYSICIAN TO MAKE AN INDEPENDENT DETERMINATION AS TO THE SEVERITY AND DURATION OF THE IMPAIRMENT. 133

November 10, 1980

Robert Pearlman, M.D.
Valley Community Clinic
110 Williams Avenue South
Renton, WA 98055

Disability Insurance Section
P.O. Box 9303
Olympia, WA. 98504

Re: Janet J. Yuckert
A/N 531-34-8353
DB: 06/03/36 BJA:lc #16

Date Patient First Examined	Frequency of Visits	Most Recent Examination
2/26/80		9/18/80 ✓

I. HISTORY AND PHYSICAL FINDINGS: Please show all pertinent findings (with dates).

2/26/80 - 43 yo WF c̄ 2 yrs of oct & gen headaches assoc c̄ disequilibrium. last episode had been for 2 months. Some relief c̄ sinus medication. Headache described as constant pressure relieved c̄ Chlor-trimeton. Past history of allergies to food, pollen. Chronic dry cough c̄ post-nasal drip. Notes tinnitus. Had had 2 mos non-positional dizziness with falling to Ⓡ previously.
Also concerned about non-exertional upper chest pressure; reportedly relieved c̄ Dyazide
Meds: Premarin, Provera, Dyazide, KCl, Valium
Exam: BP 128/73 RA = LA
nystagmus on lat gaze s̄ glasses
Chest: clear
CV: s̄ gallops or Ⓜ
Abdomen: obese; soft, non-tender; liver palpable 2 f.b. below RCM
s̄ palp spleen
Neuro: staggering tandem gait s̄ truncal ataxia
3/11/80 - ~~no~~ problems c̄ difficulty focusing, constant dizziness

39

WEIGHT ______ HEIGHT ______

II. LABORATORY AND SPECIAL STUDIES: Give Results of all Pertinent Studies with dates (In the case of EEG's, please attach a copy of the tracings or a detailed description thereof.)

Audiometry 2/25/80: mild ① sensorineural hearing loss - tympanograms + reflexes nl

134

Lumbar puncture 4/28/80 + neurology evaluation: asymmetry of cine reflexes; possible ② Marcus-Gunn pupil

3/19/80 - Internal auditory canal x-rays - no diagnostic abnormality

2/28/80 EKG normal

Results of lumbar puncture not available at present

40

III. DIAGNOSIS:

Possible multiple Sclerosis

IV. TREATMENT AND RESPONSE:

No information available as yet

Reporting Physician's Name and Address	Signature and Title	Date
J. Gehrels, MD Valley Community Clinic 110 Williams Ave So. Renton WA 98055		11/17/80

135

State of Washington
Department of Social & Health Services

Medical Records Librarian
Harborview Medical Center
325 - 9th
Seattle, WA 98104

6/17/80 to 9/02/80

Re:
Janet J. Yuckert #149-66-34-72
A/N 531-34-8353
DB: 06/08/36 BJA:lc #16

This office is responsible for evaluating a Social Security Disability, Supplemental Security Income Disability, or Medical Assistance application for the above-named individual.

Copies of pertinent medical reports in your files will help in determining the claimant's functional capacity for engaging in gainful activity.

Please mail information for the following dates: 6-17-80 to date last seen Outpatient only.

The items are needed as checked:

- ✓ 1. History and Physical
- ___ 2. Progress Notes
- ___ 3. Discharge Summary
- ___ 4. EKG tracings
- ___ 5. Surgical and Pathology Reports
- ___ 6. Sputum Cultures and Dates
- ___ 7. Pulmonary Function Tests
- ___ 8. Other ✓
- ___ 9. Current Mental Status
- ___ 10. Results of Psychological Tests
- ✓ 11. X-ray Reports of
- ✓ 12. Lab Reports

✓ Supplemental Security Income or Medical Assistance Laws allow us to pay up to $7.50 for this report. Enclosed is a voucher for your fee and signature.

___ Social Security Laws specify the claimant is responsible for payment of report.

A signed release is enclosed as your authority to supply the requested information.
Thank you for your cooperation and help.

EXHIBIT 18 (7pp)

Sincerely,

Bobbie J. Anderson

D. I. Adjudicator
Extension Number 754-4177

Sent Out NOV 14 1980
Rec'd NOV 13 1980

MEDICAL ASSISTANCE DIVISION
Office of Disability Insurance
P.O. Box 9303, LN11 Olympia, Washington 98504
206-753-2990

EXHIBIT NO. 18 (7pp)

DSHS 14-125 (REV. 7-79)
L5

INSTRUCTIONS: Complete in black ink only, because other colors do not reproduce or Microfilm well.
Notes. Each entry should note month/day/year; time; problem number and title; writer's name, title, and department, e.g. John Doe, Resident, Cardiology, or Staff Nurse, SN, or student.

DATE AND HOUR	PROB. NO.	NOTES
6/17/80		Allergy - Wt. 153# BP 110/78 136
		44 yr. old ♀ c/o 4 episodes, each lasting 1-2 months, in which she experienced headache, dysequilibrium, blurring of vision + sinus congestion. These episodes occurred in October + January of 1978 + 1979. She does not complain of rhinitis, itching of eyes, or respiratory difficulties. She has been evaluated by a neurologist c̄ nl LP, CT, electromyography + thought to be free of neurologic disease. Her headache is frontal, constant + not relieved by aspirin. Her dysequilibrium consists of a listing to the (R) upon standing c̄ dizziness but room does not spin. Visual disturbance consists of blurring upon lateral gaze to (L) or (R).
		Pt. was treated 5/29/80 c̄ Prednisone 30 mg T.I.D. for 4 days before she developed exacerbation of above sx.
		PMH - as infant, said to be allergic to mother's milk + formula.
		Skin tested @ ages 8, 12, 18 (although she was s̄ sx of allergy) + told that she had (+) response to dust, pollen, grass, trees, shrubs, strawberries, chocolate + mustard.
		Meds - diuretic, Valium
		Dyazide OCC Surg.

9-66-34-72
Yuckert, Janet

UNIVERSITY OF WASHINGTON HOSPITALS
HARBORVIEW MEDICAL CENTER
UNIVERSITY HOSPITAL
SEATTLE, WASHINGTON

PROGRESS NOTES

UH 0142 REV AUG 76

DATE AND HOUR	PROB. NO.	NOTES
		Physical Exam - $\bar{s}$ rhinitis, ~~[illegible]~~ $\bar{s}$ injected eyes, lungs clear, TM's clear. No evidence of allergic rhinitis or asthma. 137
		Skin testing: ST - Histamine (+), (−) for trees, grass, apple, banana, orange, peanut, or walnut
		ID - (−) for dust, cat, cattle, dog, feathers, horse, sheep, aspergillus, helminthosporium, penicillin, hormodendrum. $\bar{s}$ positive test.
	Imp:	~~Pt~~ given Actifed sample + prescription for Vistaril 10 mg + will RTC in 2 weeks. thought not to be allergic in nature but will follow + see her in 2 weeks.
NOV 19 '80		See with Dr. Altony. Fretwell MD
		ALLERGY ATTENDING: 44 YO ♀ with episodic headache, depression syndrome. Negative skin tests. No evidence of allergic etiology. RC Altman

DO NOT WRITE BELOW THIS LINE

UCKERT, JANET J.
13725 - 56th Ave. South (D 207)
Seattle, Wa. 98168 Phone: 242-6694

THIS ILLNESS HAS RE-OCCURED FOR THE PAST 2 YEARS -- BEGINNING IN EARLY JANUARY AND AGAIN IN EARLY OCTOBER

SYMPTOMS USUALLY LAST 1 TO 3 MONTHS (LONGER THIS TIME)

I BECAME ILL JANUARY 2, 1980

EARLY SYMPTOMS (LASTING 21 DAYS)

1. INITIALLY, HAD 5 DAYS OF SEVERE HEADACHES
2. AWOKE ON 6TH DAY WITH EQUILIBRIUM IMBALANCE (HAD DIFFICULTY IN WALKING WITHOUT FALLING TO RIGHT SIDE)
3. VISION PROBLEMS (DIFFICULTY IN FOCUSING AND RE-FOCUSING) COULD NOT FOCUS WELL ENOUGH TO READ OR DRIVE CAR
4. HEAD CONGESTION - COUGHING & SNEEZING - EYES RED-RIMMED AND ITCHY • ALSO LIKE A FILM IS COVERING EYES

CURRENT SYMPTOMS

1. DIZZINESS (CHLOR-TRIMETON ALLERGY TABS LESSEN SLIGHTLY)
2. OCCASIONAL EQUILIBRIM IMBALANCE (MUCH BETTER THAN WHEN ILLNESS BEGAN)
3. VISION PROBLEMS WITH FOCUSING AND RE-FOCUSING (SLIGHTLY IMPROVED) STILL HAVE A FILM-LIKE SUBSTANCE OVER EYES FAIRLY OFTEN
4. HEAD AND NASAL CONGESTION - SOME SNEEZING, COUGHING & HOARSENESS
5. AT TIMES, SEVERE HEADACHES (CAN BE SOMEWHAT CONTROLLED WITH CHLOR•TRIMETON)

NOTES:

1. HISTORY OF ALLERGIES - FROM BIRTH UNTIL 20 YEARS OF AGE
   (ALLERGIC TO MILK, FOODS, POLLEN, DUST, RAGWEED, GRASS AND OTHERS)
2. OCTOBER 1978 AND OCTOBER 1979 -- BOTH YEARS WEATHER WAS UNUSUALLY WARM
   (I ENJOY BEING OUTDOORS AND PICK DRIED FLOWERS AND WEEKS FOR ARRANGEMENTS)

   CHRISTMAS 1978 AND 1979 -- BOTH YEARS WERE SPENT WITH PARENTS IN BREMERTON (LOTS OF EVERGREEN TREES, SHRUBS, FLOWERING PLANTS, BUSHES)

   ALSO SLEEP WITH WOOL BLANKET (DO NOT HAVE WOOL BLANKETS USUALLY)

POSSIBLE CAUSES??? POLLEN - RAGWEED - DRIED FLOWERS & WEEDS - GRASS - BUSHES & SHRUBS - EVERGREEN TREES • WOOL - FRAGRANT CANDLES • FRUITCAKE • HOT BUTTERED RUM NUTS

INSTRUCTIONS: Complete in black ink only, because other colors do not reproduce or Microfilm well.
Notes: Each entry should note month/day/year; time; problem number and title; writer's name, title, and department, e.g. John Doe, Resident, Cardiology, or Staff Nurse, SN, or student.

DATE AND HOUR	PROB. NO.	NOTES
JUL 1 1980		ALLERGY Wt 149 1/2 # BP 140/86 139
		Her note says it all - She spent 20 min
		arguing about what antihistamine she might try
		- She would like to try 22 different kinds - each
		with a visit to discuss, Whatever she has,
		Dr Fretwell is much better at it than I am
		optimize trial. - Polaramine 6 mg trial 1 HS
		Actifed by day - Reid John
		Leonard C Altman

9-66-34-72
Yuckert, Janet

UNIVERSITY OF WASHINGTON HOSPITALS
HARBORVIEW MEDICAL CENTER
UNIVERSITY HOSPITAL
SEATTLE, WASHINGTON

PROGRESS NOTES

UH 0142 REV AUG 76

DATE AND HOUR	PROB. NO.	NOTES
JUL 15 1980		ALLERGY Wt. 149# BP 130/78
	#1	Nasal Congestion, HA and dizziness. 140
		Continues, on the whole, to have a positive response to antihistamine/decongestants. Still having some problems w drowsiness/hyperreactivity -
		Still likes Vistaril nighttime / Achfed daytime combination
		Plan (1) suggested Isoclor as alter to Achfed
		(2) I last visit for Rx re eval.
		Fretwell M.D.
Aug 5 1980		
	#1	Nasal Congestion:
		doing better off and on - still focusing on Rx side effects
		Imp: Chronic disability
		Plan: (1) decadron turbinates & monitor side effect of antihistamine
		(2) RTC prn
		Fretwell M.D.

DO NOT WRITE BELOW THIS LINE

INSTRUCTIONS: Complete in black ink only, because other colors do not reproduce or Microfilm well.
Notes: Each entry should note month/day/year; time; problem number and title; writer's name, title, and department, e.g. John Doe, Resident, Cardiology, or Staff Nurse, SN, or student.

DATE AND HOUR	PROB. NO.	NOTES
9/2/80		Allergy Wt 143# BP 118/72 Ry
		141
	#1	Nasal / Middle ear congestion
		Eureka! good response to
		Decadron turbinaire + ophthalmic at
		night. Able to drive, dance, etc.
		Exam: nasal congestion about
		the same.
		Imp: Nasal / Middle ear syndrome
		with dizziness, headache and
		change in voice.
		Plan - cont. Rx
		write letter for Voc Rehab.
		RTC prn
		Frelwell MD.

9-66-34-72
Yuckert, Janet

UNIVERSITY OF WASHINGTON HOSPITALS
HARBORVIEW MEDICAL CENTER
UNIVERSITY HOSPITAL
SEATTLE, WASHINGTON

PROGRESS NOTES

UH 0142 REV AUG 76

STATE OF WASHINGTON
Dixy Lee Ray
Governor

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
624 SW 150th, P.O. Box 66827, L 44-2, Burien, Washington 98166

2-26-80
142
9-15-80

12/3/80

Bobbe J. Andersen
HSD-DI Section
P.O. BOX 9303
Olympia, WA 98504

RE: Yuckert, Janet J.
A/N 531-34-8353

SSA BRANCH OFFICE

Dear Bobbe:

Ms Yuckert applied for D.V.R. services on 8/29/80. At that time diagnostic and evaluation procedures were started and she was found eligible on 10/10/80. Her primary disability is degenerative eye and equilibrium disease and a secondary disability of allergic rhinitus and otitis.

We are presently working with her in helping sort out vocations which do not require extensive use of her eyes, especially which require rapid eye movement and focus-refocus types of activities. We hope to be able to write a reasonable vocational plan before the first of the year so that if schooling is involved she will be able to start winter quarter.

I have attached copies of medical reports we have received. We hope these will be helpful to you in your eligibility determination. Ms Yuckert will need some type of financial support while being retrained. She is a self motivated and work oriented individual and should be successfully rehabilitated within her medical limitations.

If I can be of further service, feel free to contact me.

Sincerely,

Raymond E. Johnson

Raymond E. Johnson, MSW
Vocational Rehabilitation
Counselor III

464-7675

EXHIBIT 19 (17pp)

REJ:dmf
Ecn.

HAN
PRONG FILE ONLY
Current Date 12-8-80
Initials
Decision
II-

EXHIBIT NO. 19

HARBORVIEW MEDICAL CENTER
325 NINTH AVENUE
SEATTLE, WASHINGTON 98104
206 · 223 · 3000

143

September 15

Dear Mr. Johnson,

This letter is in reference to Ms. Janet Yuckert. I have seen her several times in Allergy Clinic to attempt control of her dizziness and visual difficulties. Although we have no well described diagnosis; by exclusion (she had extensive opthalmologic, neurologic and ENT evaluations before coming to my clinic) I would say that she has non-specific congestion of the nasal and middle ear mucous membranes leading to her symptoms. She is currently on antihistamine therapy and demonstrating some

49

improvement in symptoms. The
patients with diffuculty leading. Even
if she were to become completely
asymptomatic, there is a possibility
of relapse. I hope this information
is helpful. Clinic Records will
also be sent.

Marsha Fretwell M.D
Allergy Clinic
HMC

50

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98195

159

October 9, 1980

To whom it may concern:

This is to document that Ms. J. Yuckert is disabled by a syndrome of middle ear congestion. The physical disability is one of dizziness and difficulty reading. Despite medications, her symptoms persist and may do so indefinitely.

Marsha Fretwell M.D.

Marsha Fretwell, M.D.
Allergy Clinic

51

EXHIBIT 20

EXHIBIT NO. 20

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PUBLIC HEALTH SERVICE

BUREAU OF MEDICAL SERVICES
DIVISION OF HOSPITALS AND CLINICS

160

U. S. Public Health Service Hospital
P. O. Box 3145
Seattle, Washington, 98114

Refer to:

17 October 1980

YUCKERT, Janet
PHS# 43 81 07

TO WHOM IT MAY CONCERN:

Mrs. Yuckert was first seen here on 19 March 1980. She complains of dizziness without rotary vertigo for at least the past two years but since January, 1980 has been incapacitated. She also complains of being unable to focus and complains of frontal headaches. She also complains of a left tinnitus. Significant past medical history includes a left sudden sensori-neural hearing loss in 1970 which has returned. She has past histories of chronic nasal congestion and felt that from January to June the dizziness has been more aggravated over the last two years.

The initial examination of head, eyes, ears, nose and throat reveals a spontaneous nystagmus going to the left side. X-rays of the internal auditory canals, electronystagmogram and brain stem evoked response and audiometry were normal. Because of the associated visual problems, a neurology consult was obtained to rule out a diffuse intracranial problem. She was extensively worked up by the Neurology Clinic and they did not feel that she had multiple sclerosis. Because of the incidences of her dizziness coming at the same time each year, the possibility of an allergic component was investigated. She was seen by the Allergist at Harborview Medical Center. She was positive to dust. Medications were not helpful.

I feel that Mrs. Yuckert has labyrinthine dysfunction bilaterally. It is incapacitating and is not controllable with medications at the present time. As this is bilateral, I do not feel that there is any surgical procedure that will be indicated. I feel that Mrs. Yuckert will be disabled for an indefinite period of time to the best of my estimate.

Matthew L. Wong, M.D.
Otologist
Dept. of Otolaryngology

MLW:mc

EXHIBIT 21

EXHIBIT NO. 21

52

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PUBLIC HEALTH SERVICE

BUREAU OF MEDICAL SERVICES
DIVISION OF HOSPITALS AND CLINICS

U. S. Public Health Service Hospital
P. O. Box 3145
Seattle, Washington, 98114

Refer to:

7 January 1981

185

YUCKERT, Janet
PHS# 43 81 07

TO WHOM IT MAY CONCERN:

Mrs. Yuckert was first seen by me on 19 March 1980. She complains of dizziness without rotary vertigo for at least the past two years but since January, 1980 has been incapacitated. She also complains of difficulty to focus and complains of frontal headaches. She complains of a left tinnitus. Significant past medical history includes a sudden left sensori-neural hearing loss in 1970 which has returned. She gives a past history of chronic nasal congestion and felt that from January to June the dizziness has been more aggravated over the past two years.

The initial examination of the head, eyes, ears, nose and throat reveals a spontaneous nystagmus going to the left side. X-rays of the internal auditory canals, electronystagmogram and brain stem evoked response and audiometry were normal. Because of the associated visual problems, a neurology consult was obtained to rule out a diffuse intracranial problem. She was extensively worked up by the Neurology Clinic and they did not feel that she had multiple sclerosis. Because of the incidences of her dizziness coming at the same time each year, the possibility of an allergic component was investigated. She was seen by an Allergist at Harborview Medical Center and was positive to dust. Medications were not helpful.

I feel that Mrs. Yuckert has dizziness without rotary vertigo. This is most likely labyrinthine in origin and is bilateral. It is incapacitatingand is not controlled with any kind of medications. As this is bilateral, I do not feel there is any surgical procedure that will alleviate the problem. She will be followed on a periodic basis.

Matthew L. Wong, M.D.
Otologist
Dept. of Otolaryngology

MLS:mc

53

EXHIBIT 23 (2pp)

EXHIBIT NO. 23

January 12, 1981

SOCIAL SECURITY ADMINISTRATION Ref: Janet J. Yuckert 186
Claim # 531-34-8353 A

I would like this statement to be considered in my case review.

I became ill on January 2, 1980 and have been ill continously since that date.

SYMPTOMS:

1. Severe vision problems (in focusing and re-focusing) - this restricts reading and driving a car.
2. Equilibrium imbalance - difficulty in walking or standing without falling to right side.
3. Dizziness - constantly (not vertigo) - this further restricts ability to read, drive, walk, perform normal household chores, etc.
4. Severe headaches - (not controllable by aspirin)
5. Head and nasal congestion (not controllable by prescribed medication)

During 1978 and 1979, I had this same illness but only lasting for 1-3 months.

October 6, 1978 until December 17, 1978

December 29, 1978 until approximately January 30, 1979

October 9, 1979 until November 17, 1979

(The medical records substantiate this data)

During the above-mentioned periods - I was not able to work.

When I became ill again on January 2, 1980, I assumed this was the same "virus or whatever" that I had previously and that I would recover from the illness within 1-2 months. The symptoms were more severe and I was unable to walk without holding onto walls or furniture and could not care for myself. My parents or friends prepared meals, performed errands and did household chores for me.

When it became apparent that I was not going to recover on my own, I did seek medical treatment. On February 26, 1980 I was examined thoroughly by Dr. Robert Pearlman of the Valley Community Clinic and then referred to Public Health Hospital for extensive medical tests. It was necessary for friends or relatives to take me to all doctor appointments and for tests.

The diagnosis given me by Dr. Matthew Wong, Otologist - was degeneration of the inner ear. He made this diagnosis on April 2, 1980 and told me the condition was not operable - also, there was no medication to control this disease.

EXHIBIT 24 (2pp)

54

Ref: Janet J. Yuckert
Claim # 531-54-8353 A

187

In addition to degeneration of the inner ear and all it's complications, I have had weak arches/flat feet since I was a child. I saw various orthopedic specialists and wore orthopedic shoes - this did not correct the condition. I am not able to stand or walk continously for extended periods of time (3 plus hours) - without an equal amount of time being seated. This has limited my past employment fields to "office type" occupations.

Due to the affects of degeneration of the inner ear, I have not been able to work nor to enjoy a "normal life".

Janet J. Yuckert

13725 - 56th Avenue South (D 207)
Seattle, Washington 98168

55

FUNCTIONAL ASSESSMENT

188

NAME Janet Vuckert SSA# 531-34-8353

DOCTORS: Please complete the following form based on objective findings only.

		YES	NO
1. Can claimant stand through out a normal work day?* (If NO, explain below)		✓	
2. Can claimant walk throughout a normal work day?* (If NO, explain below)		✓	
3. Is claimant restricted to walking on smooth surfaces only?			✓
4. Can claimant sit 6 hours or more in an 8-hour day?		✓	
5. Can claimant lift:	(a) up to 10 lbs.?	✓	
	(b) 10 - 20 lbs.?	✓	
	(c) 20 - 50 lbs.?	✓	
	(d) over 50 lbs.?		✓
6. Can claimant perform this lifting frequently?		✓	
7. Can claimant use dominant hand for:	(a) gross manipulation?	✓	
	(b) fine manipulation?	✓	
	(c) grasping?	✓	
8. Can claimant use non-dominant hand for:	(a) gross manipulation?	✓	
	(b) fine manipulation?	✓	
	(c) grasping?	✓	
9. Can claimant use arms above shoulder level?		✓	
10. Can claimant use right foot as in operating foot controls?		✓	
11. Can claimant use left foot as in operating foot controls?		✓	
12. Can claimant bend frequently?		✓	
13. Can claimant climb stairs frequently? ?			
14. Can claimant climb ladders frequently?			✓
15. Does claimant have any:	(a) environmental restrictions?		✓
	(b) visual restrictions?		✓
	(c) auditory restrictions?		✓
16. Can claimant:	(a) follow simple instructions?	✓	
	(b) perform routine repetitive tasks?	✓	
	(c) respond appropriately to supervisors and co-workers	✓	
17. Are there other functional limitations to be considered?			✓

ADDITIONAL COMMENTS: (Use reverse side if necessary)
*If answer is NO, how many hours can claimant stand or walk?

EXHIBIT 25

EXHIBIT NO. 25

DATE 5 Feb 91

Joseph Rubin
Signature of Physician

56

STATE OF
WASHINGTON

Dixy Lee Ray
Governor

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
149 S. 140th, P. O. Box 66532, N 44-2, Burien, Washington 98166

192

4/15/81

James Douglas
~~Evergreen Legal Services~~
Seattle, WA

RE: Yuckert, Janet J.

Dear Mr. Douglas:

I am writing in order to bring you up-to-date on Janet and her involvement with the Division of Vocational Rehabilitation.

Janet applied for D.V.R. services at the suggestion of her C.E.T.A. counselor, Shirley Allen on 8/29/80. At that time she had been bothered by recurring problems of dizziness, focus and refocusing of her eyes. She had not worked since 12/79 due to these problems.

She became eligible for D.V.R. on 10/1/80 with a primary diagnosis of degenerative eye and equilibrium disease and secondary diagnosis of allergic rhinitus and otitis.

Upon examining her test results and having Janet explore vocational alternatives and programs available to assist her in returning to the work market, we embarked upon a two year community college training plan toward computer programming. She commenced her program at Highline Community College in January, 1981. She did very well grade wise for winter quarter although two things became evident very quickly.

Problems:

Janets eye problems keep her from being able to take a "normal" course load of 15 credits. She started with 13 credits, but was only able to complete 11 credits. She found that she could only study for up to 30 minutes and would then have to take a 30 minute break.

Thus, in order to get reasonable grades she has to study for longer periods of time in order to keep a continuity of subject content.

A second problem, again relating to her eyes, she has to read at a slower pace because of the focus-refocus problems.

EXHIBIT 28 (2pp)

I think that once she has completed the program and is ready to go to work, thes problems will be significantly reduced as the amount of reading she does now

57

EXHIBIT #28

STATE OF
WASHINGTON

Dixy Lee Ray
Governor

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
749 S. 140th, P. O. Box 66532, N 44-2, Burien, Washington 98166

193

4/15/81

James Douglas
Seattle, WA

RE: Yuckert, Janet J.

58

will not be required on the job. As far as her being employable now, she is not. Her previous jobs required a lot of reading and reading small print (i.e. sales contracts).

Computer programming is a constantly enlarging field and trained people should have little problem obtaining employment. DVR thinks that the training is appropriate for Janet in all areas: 1) capabilities, 2) interests and most importantly, 3) within her medical limitations.

If I can be of any further help, please feel free to contact me.

Sincerely,

Raymond E. Johnson

Raymond E. Johnson, MSW
Vocational Rehabilitation
Counselor III

464-7675

REJ:dmf
Enc.

In the Supreme Court of the United States

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ORDER ALLOWING CERTIORARI. Filed May 19, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20525

No. 85-1409 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MARK B. STERN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

68 pp

QUESTION PRESENTED

Whether the court of appeals erroneously invalidated a regulation promulgated by the Secretary of Health and Human Services, 20 C.F.R. 404.1520(c), which provides that a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 774 F.2d 1365. The order of the district court (Pet. App. 14a) and the recommendation of the magistrate (Pet. App. 15a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985 (Pet. App. 13a). By order dated January 14, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including February 21, 1986. The petition was filed on that date and was granted on May 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 223(d)(1)(A), (2)(A) and (C) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A), (2)(A) and (C); Section 1614(a)(3)(A), (B) and (G) of the Social Security Act, as codified at 42

U.S.C. (& Supp. II) 1382c(a)(3)(A), (B) and (G); and 20 C.F.R. 404.1520, 404.1521, 416.920, 416.921, are reproduced at App., *infra*, 1a-7a.

STATEMENT

The court of appeals in this case invalidated a regulation that is an integral part of the sequential evaluation process established by the Secretary of Health and Human Services for determining whether a person seeking Social Security disability benefits is disabled. The regulation provides that if the claimant does not have a medically "severe" impairment—defined to mean an impairment that significantly limits his mental or physical ability to do the basic work activities that are necessary for most jobs—the claimant will be found not to be disabled.

A. THE STATUTORY AND REGULATORY FRAMEWORK

Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability." 42 U.S.C. (Supp. II) 423(a)(1)(D). Disability benefits also are provided under the Supplemental Security Income (SSI) program established by Title XVI of the Act. 42 U.S.C. (& Supp. II) 1382(a). The term "disability" is defined to mean

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *[.]

42 U.S.C. 423(d)(1)(A); see also 42 U.S.C. 1382c(a)(3)(A). The Act further provides in relevant part that an individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. (Supp. II) 423(d)(2)(A); 42 U.S.C. 1382c(a)(3)(B).

To implement these statutory definitions, the Secretary by regulation has established a five-step "sequential evaluation" process to be followed by the decision-maker (the state agency, the administrative law judge (ALJ), or the Appeals Council) in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. See *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 2-3; *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983). At step 1 of that process, the decision-maker determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is not disabled. 20 C.F.R. 404.1520(b), 416.920(b).

If the claimant is not engaged in substantial gainful activity, the sequential evaluation process continues to step 2, which is at issue in this case. At step 2, the decision-maker determines whether the individual has demonstrated the existence of a medically "severe" impairment or combination of impairments. 20 C.F.R. 404.1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1521(a), 416.921(a)), which are defined to mean "the abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b), 416.921(b)). The regulations identify examples of such abilities and aptitudes: (1) "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; (2) "[c]apacities for

seeing, hearing, and speaking"; (3) "[u]nderstanding, carrying out, and remembering simple instructions"; (4) "[u]se of judgment"; (5) "[r]esponding appropriately to supervision, co-workers and usual work situations"; and (6) "[d]ealing with changes in a routine work setting" (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant does not have an impairment that significantly limits his ability to do such basic work activities, he will be found not to be disabled at step 2, without consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).[1]

If the claimant is found to have a "severe" impairment, the decision-maker then must determine at step 3 of the sequential evaluation process whether the impairment is so serious as to meet or equal the listed impairments that are deemed by the Secretary to be of sufficient severity to preclude substantial gainful activity, without the need to consider the claimant's age, education, and work experience. 20 C.F.R. 404.1520(d), 416.920(d); 20 C.F.R. Pt. 404, Subpt. P, App. 1. If the individual's impairment is not one that is "conclusively presumed" to be disabling under these listings (see *Bowen* v. *City of New York,* slip op. 2), the decision-maker then must determine at step 4 whether the impairment prevents the individual from per-

[1] The sequence in which the severity of the impairment is considered is somewhat different under the recently promulgated regulations governing the evaluation of claimants who already are receiving disability benefits. See 50 Fed. Reg. 50135-50136, 50142-50143 (Dec. 6, 1985), adding 20 C.F.R. 404.1594(f) and 416.994(b)(5). This different sequence was adopted in order to take account of the new "medical improvement" standard enacted in Section 2 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794-1799, 42 U.S.C. (Supp. II) 423(f), 1382c(a)(5). See *Bowen* v. *City of New York,* slip op. 18 n.14; note 11, *infra*. This case involves a new applicant for benefits, not a current recipient, and it therefore is governed by the regulations discussed in the text.

forming his own past work. If the claimant can do his past work, he is found not to be disabled. 20 C.F.R. 404.1520(e), 416.920(e). But if the claimant cannot do his past work, the decision-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he nevertheless is able to perform other work that exists in the national economy. At this final step, the Secretary ordinarily applies the medical-vocational guidelines that were sustained by this Court in *Heckler* v. *Campbell, supra.*

B. THE PROCEEDINGS IN THIS CASE

1. Respondent applied for Social Security disability benefits and SSI benefits in October 1980 (R. 82, 86).[2] She alleged that she was disabled on the basis of labyrinthine (inner ear) dysfunction with occasional episodes of dizziness; loss of visual focus; and flat feet (Pet. App. 15a, 26a; R. 82). After her claim was denied at the initial determination and reconsideration stages (J.A. 19-26; R. 90-96, 98), respondent requested a hearing before an ALJ.

The record before the ALJ showed that respondent was 45 years old and had a high school education, two years of business college, and real estate training (Pet. App. 26a). From 1963 to 1977, she had been employed as a travel agent (*id.* at 15a, 26a). From September 1978 through September 1979, with interruptions due to illness, respondent worked in real estate sales (*id.* at 15a); she testified that "the market kind of just fell because of the high interest rate and so I left that job in September of 1979" (R. 52).

Following the hearing (R. 34-81), the ALJ concluded that respondent's impairments were not severe within the meaning of 20 C.F.R. 404.1520(c) and 416.920(c) and denied her claim (Pet. App. 24a-27a). The ALJ found that

[2] "R." refers to the transcript of the administrative record that was certified to the district court pursuant to 42 U.S.C. 405(g).

although respondent was not "free from episodes of dizziness or vision problems," she was "exaggerating the effects of her impairments" and, in particular, "appear[ed] to be overemphasizing the effect of her impairments on her ability to perform basic functions" (*id.* at 28a). The ALJ found in this regard that "[m]ultiple tests given [to respondent] failed to divulge objective clinical findings of abnormalities that support [the alleged] severity of the stated impairments" (*id.* at 27a), observing that respondent was successfully pursuing a "relatively difficult" two-year community college training plan for computer programming (*id.* at 27a-28a). In the ALJ's view, respondent's success in computer training, "coupled with generally negative clinical findings" and her ability to perform various activities, such as driving her car 80 to 90 miles per week, demonstrated that her vision and balance problems "[did] not significantly limit her ability to perform basic work-related functions, e.g., real estate salesperson" (*id.* at 28a).[3]

The Appeals Council denied respondent's request for review (Pet. App. 21a-22a), explaining that additional psychological testing data submitted to the Appeals Council by respondent's representative did not undermine the ALJ's decision (*id.* at 22a):

> The over-all results of all the testing indicated an average range of intellectual abilities, with no pro-

[3] The ALJ noted that a vocational expert called by respondent had testified that respondent's medical condition would preclude her from working competitively, but the ALJ found that "the objective clinical diagnostic findings of record do not support the conclusion that [respondent] is 'disabled' " (Pet. App. 27a). The ALJ explained that "[s]ymptoms alone do not establish there is a physical or mental impairment" and that "[m]edical signs [or] findings should be accompanied by a medical condition that could reasonably be expected to produce the symptoms" (*ibid.*). See 42 U.S.C. (Supp. II) 423(d)(5), 1382c(a)(3)(H); 20 C.F.R. 404.1529. See note 11, *infra*.

> found irregularities and the majority of skills still fully intact. Only the finger dexterity test administered showed a degree of difficulty. The Appeals Council notes in that regard that the limitations potentially imposed by the difficulty you might experience in small detailed parts dexterity does not indicate an inability to perform any substantial gainful activity. The weight of the entire evidence of record in your case, including the new evidence, supports the administrative law judge's finding that you do not have any significant impairment of work-related abilities.

2. Respondent then sought judicial review in the United States District Court for the Western District of Washington pursuant to 42 U.S.C. 405(g). The case was referred to a magistrate, who recommended that the district court affirm the Secretary's decision that respondent had not established that she had a severe impairment (Pet. App. 15a-19a). The magistrate noted the testimony by a vocational expert and a statement by a physician that respondent's impairments were incapacitating (*id.* at 18a). On the other hand, the magistrate found that respondent's success in the community college program "is substantial evidence of her ability to perform basic work activities" (*id.* at 17a-18a). In the magistrate's view, this determination was "reinforced" by the opinion of respondent's counselor at the state Department of Vocational Rehabilitation that respondent would have little problem in obtaining employment when she completed her training (*id.* at 18a). Although the evidence thus was conflicting regarding the severity of respondent's impairments, the magistrate concluded: "It is the function of the Secretary, * * * not of this court, to weigh that evidence and to resolve the issue. Because there is substantial evidence in support of the Secretary's conclusion, this court is required to affirm her determination" (*id.* at 19a). The dis-

trict court adopted the magistrate's report and affirmed the Secretary's decision denying respondent's claim (*id.* at 14a, 20a).

3. The court of appeals reversed and remanded (Pet. App. 1a-12a). The court of appeals did not reach the question whether there was substantial evidence to support the Secretary's decision that respondent did not have a severe impairment that significantly limited her ability to do basic work activities. Instead, the court held that the regulation that permits the Secretary to deny benefits at step 2 of the sequential evaluation process because of the absence of a severe impairment is invalid.[4] The court therefore directed that the case be remanded to the Secretary to be reconsidered without reliance on the severity regulation.

a. The court of appeals recognized that under 42 U.S.C. 405(a), "Congress has delegated to the Secretary broad power 'to prescribe standards for applying certain sections of the [Social Security] Act' " (Pet. App. 8a, quoting *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 43 (1981)). The court further recognized that the severity regulation must be sustained unless it exceeds the Secretary's statutory authority or is arbitrary and capricious (Pet. App. 8a, citing *Heckler* v. *Campbell,* 461 U.S. 458, 466 (1983)). However, the court held that the severity regulation violates the Social Security Act because, in the court's view, "it does not permit the individualized assessment of disability required by the Act" (Pet. App. 8a). The court gave three reasons for its conclusion.

First, the court believed that the regulation is inconsistent with 42 U.S.C. 423(d)(2)(A), which provides that a

[4] The court of appeals acknowledged that respondent had not challenged the severity regulation in district court, but the court nevertheless chose to consider the issue because it "is purely one of law" and "a significant question of general impact" (Pet. App. 4a-5a). Although respondent applied for disability benefits under the SSI program as well as Title II (see page 5, *supra*), respondent's complaint in district court referred only to Title II and the court of appeals discussed only the severity regulation under Title II (Pet. App. 2a, 6a-7a, 11a-12a).

claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *." The court interpreted this provision to require the Secretary specifically "to consider factors such as [the claimant's] age, education, work experience, and ability to do past work" in *every* disability determination, irrespective of whether the claimant has demonstrated that his impairment satisfies a threshold level of severity (Pet. App. 5a, 9a).

Second, the court "reject[ed] the Secretary's contention that the legislative history of the Act, particularly the [Social Security Disability Benefits Reform Act of 1984], supports the sequential evaluation process" (Pet. App. 9a). The court acknowledged that Congress considered the severity regulation when it enacted the 1984 Act and had failed to eliminate the established requirement that the claimant demonstrate a severe impairment. However, relying on the fact that the House Report had "urge[d]" the Secretary to revise the severity criteria in order " 'to reflect the real impact of impairments upon the ability to work' " (*id.* at 10a, quoting H.R. Rep. 98-618, 98th Cong., 2d Sess. 8 (1984)), the court believed that the legislative history of the 1984 Act did not suggest a congressional intent to permit a finding of non-disability to be based on medical evidence alone (Pet. App. 10a).

Third, the court held that the regulation is contrary to judicial decisions that it construed to require that "disability determinations be made according to a two-step process, with the claimant first showing an inability to perform [his] past relevant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work" (Pet. App. 10a). Because the court believed that "the severity regulation ignores vocational

factors where a claimant's impairment is found nonsevere," it held that the regulation "conflicts with this precedent and thus improperly denies benefits to a claimant who has made a prima facie showing of disability" (*id.* at 10a-11a).

b. The court of appeals acknowledged, albeit only in a footnote (Pet. App. 9a n.6), that the Secretary had adopted a new Social Security Ruling, SSR 85-28, for the purpose of clarifying the application of the severity standard at step 2 of the sequential evaluation process. See Pet. App. 37a-44a. SSR 85-28 reflects both the Secretary's ongoing reevaluation of step 2 (see pages 47-48 & note 29, *infra*) and the Secretary's response to concerns expressed by several courts of appeals that the regulation might be too strictly applied. The Secretary explained in SSR 85-28 that the current severity regulation, which was promulgated in 1978[5] and revised somewhat in 1980,[6] was not intended to alter the threshold level of impairment severity that had been applied prior to 1978. Under the pre-1978 standard, a claimant could be found not to be disabled on medical evidence alone (*i.e.*, without specific consideration of his age, education, and work experience) if his impairment was "a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities." 20 C.F.R. 404.1502(a) (1977). Accordingly, the Secretary emphasized in SSR 85-28 that benefits are to be denied at step 2 of the current sequential evaluation regulations only when an individual's impairments "would have no more than a minimal effect on [his] ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a).

---

[5] 43 Fed. Reg. 55363, 55371 (1978), adding 20 C.F.R. 404.1503(c), 404.1504(a)(1), 416.903(c), 416.904(a)(1).

[6] 45 Fed. Reg. 55588, 55624-55625 (1980), adding 20 C.F.R. 404.1520 (c), 404.1521, 416.920(c), 416.921.

The court of appeals recognized that SSR 85-28 interprets the severity regulation in the same manner as that approved by five other circuit courts (Pet. App. 8a-9a n.6).[7] However, the court expressed no view on the validity of SSR 85-28 because it had not then been formally published[8] and because the court in any event concluded that "the regulation it interprets is inconsistent with the Social Security Act" (*ibid.*).

SUMMARY OF ARGUMENT

The severity regulation at issue in this case is applied at step 2 of the five-step sequential process for the evaluation of disability claims. It is a screening mechanism that implements the congressional intent that Social Security disability benefits are to be paid only to those individuals whose impairments are sufficiently serious that they may properly be regarded as a substantial cause of their alleged inability to work. The Secretary is authorized by 42 U.S.C. 405(a) to adopt such regulations for the purposes of prescribing the procedures and evidentiary showings required in the adjudication of disability claims and of giving content to the statutory standards of eligibility. Contrary to the court of appeals' view, the particular regula-

---

[7] Citing *Farris* v. *Secretary of Health & Human Services*, 773 F.2d 85, 89-90 (6th Cir. 1985); *Estran* v. *Heckler*, 745 F.2d 340, 341 (5th Cir. 1984); *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady* v. *Heckler*, 724 F.2d 914, 920 (11th Cir. 1984). The fifth appellate decision cited by the court below was that of the Second Circuit in *Chico* v. *Schweiker*, 710 F.2d 947, 954-955 & n.10 (1983). However, since the date of the Ninth Circuit's opinion in this case, the Second Circuit in another case has affirmed a preliminary injunction barring the use of the severity regulation. See *Dixon* v. *Heckler*, 785 F.2d 1102 (1986), petition for cert. pending, No. 86-2, discussed at note 9, *infra*.

[8] SSR 85-28 was published in November 1985 as part of the October 1985 quarterly Social Security Rulings.

tion at issue here is fully supported by the text, legislative history, and consistent administrative implementation of the Social Security Act.

A.

The basic statutory definition of the term "disability," set forth in 42 U.S.C. 423(d)(1)(A), is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The severity regulation gives content to and is fully consistent with that definition. Although the regulation requires that the claimant's impairment must satisfy a certain threshold level of severity based on medical evidence alone, that level of severity is measured essentially in vocational terms: the effect of the impairment on the claimant's mental and physical capacity to work. Thus, the regulation provides that a person is not disabled if he does not have an impairment (or combination of impairments) that "significantly limits" his ability to do "basic work activities" (20 C.F.R. 404.1520(c)), which are the "abilities and aptitudes necessary to do most jobs" (20 C.F.R. 404.1521(b)). If the claimant has not shown that his impairment significantly limits his ability to do such "basic work activities," then his impairment plainly does not render him unable to perform "any substantial gainful activity" within the meaning of the statutory definition of "disability" in 42 U.S.C. 423(d)(1)(A).

Moreover, a number of provisions of the Act make clear that the claimant must demonstrate on the basis of medical evidence that he has a physical or mental impairment to which his alleged inability to work may properly be attributed. Section 423(d)(1)(A) itself requires that the impairment ~~by~~ be "medically determinable" and that the inability to work be "by reason of" such an impairment. In addition, the term "physical or mental impairment" is defined to mean one that is "demonstrable by medically

acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3). As this Court has recognized, the claimant bears the burden of making such a medical showing (*Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976)), and that burden is confirmed by 42 U.S.C. (Supp. II) 423(d)(5)(A), which provides that "[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

The court of appeals did not discuss these statutory provisions that support the severity regulation. Instead, it found the regulation to be inconsistent with 42 U.S.C. (Supp. II) 423(d)(2)(A), which provides that an individual shall be determined to be under a disability "only if" his impairment is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." The court of appeals believed that the reference in this provision to the claimant's "age, education, and work experience" requires a consideration of these factors in every disability determination and that benefits therefore cannot be denied on the basis of medical evidence alone. Contrary to that court's view, however, Section 423(d)(2)(A) by its terms states further conditions of eligibility that must be satisfied before an application for benefits may be *granted*. It does not impose any additional conditions that must be satisfied in order for an application to be *denied*, where the Secretary has determined that the claimant has failed to satisfy the requirements of the basic definition of the term "disability" in Section 423(d)(1)(A) and implementing regulations—including, as here, the threshold requirement that the claimant's impairment be severe. Moreover, as the interpretative guidance in SSR 85-28 makes clear, the severity regulation is consistent with Section 423(d)(2)(A) even if that provision does

impose additional limitations on the denial of an application. In SSR 85-28, the Secretary explained that an impairment is found to be "not severe" only when the medical evidence establishes that the impairment "would have no more than a minimal effect on [the] individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a).

In any event, the validity of the severity regulation is expressly confirmed by 42 U.S.C. (Supp. II) 423(d)(2)(C), which was added by the Social Security Disability Benefits Reform Act of 1984. This new provision requires that the combined effect of all of the individual's impairments be considered in determining whether his condition is of "sufficient medical severity" that it could be the basis of eligibility, and further provides that if the Secretary does find a "medically severe" combination of impairments, the effect of those impairments shall be considered "throughout the disability determination process." The quoted phrases plainly contemplate the continued use of the severity step of the sequential evaluation process.

B.

The validity of the severity step of the sequential evaluation process is further confirmed by the legislative history of the relevant provisions of the Social Security Act and by the administration of the disability program since its inception in 1954. As an initial matter, the Senate and House reports on the Social Security Amendments of 1954 stress that the claimant must be "totally disabled"; that he must have both a medically determinable impairment of "serious proportions" and an inability to work "by reason of such impairment"; and that the impairment must be of a "degree of severity" to justify its consideration as the cause of his failure to obtain substantial gainful work. H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954). This expression of

congressional intent firmly supports the requirement that a claimant's impairment satisfy a threshold level of severity. Moreover, the Secretary made clear in instructions issued to the state agencies immediately after the 1954 amendments were enacted that a person could be found on medical evidence alone not to be disabled, and this administrative interpretation was carried forward in formal regulations promulgated in 1960. This contemporaneous implementation of the Act is entitled to great weight.

When Congress enacted 42 U.S.C. 423(d)(2)(A) in the 1967 amendments to the Social Security Act, it did not overrule or express disapproval of this position reflected in published regulations since 1960. To the contrary, in language that is a virtual blueprint for the sequential evaluation process now in effect, the committee reports on the 1967 amendments describe three distinct showings the claimant must make, the first of which is that "he has a severe medically determinable physical or mental impairment or impairments" (S. Rep. 744, 90th Cong., 1st Sess. 48-49 (1967); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967)). After the 1967 amendments were enacted, the Secretary revised the disability regulations to take account of those amendments, and he retained the provision in the 1960 regulations that permitted benefits to be denied on medical grounds alone. This retention reflects a contemporaneous and manifestly reasonable understanding by the Secretary that Congress did not intend in 1967 to overturn the Secretary's formal and longstanding administrative interpretation.

The severity regulation at issue in this case, which was promulgated in 1978 as part of the formal sequential evaluation process, carries forward this prior administrative interpretation and practice under the disability program. Congress again declined to disturb this regulation and the statutory interpretation it embodies when it amended the disability provisions in 1980 and 1982, and

the legislative history of the 1980 amendments in fact reiterates the intent of the 1967 amendments that the claimant must demonstrate that he has a "severe medically determinable" impairment.

Any remaining doubt regarding the validity of the severity regulation is dispelled by the Social Security Disability Benefits Reform Act of 1984. As we have said, amendments made by that Act expressly refer to the determination of whether the claimant's impairment is "medically severe." But in addition, the committee reports and floor debates make clear that Congress fully understood that a claim can be denied as "non-severe" at step 2 of the sequential evaluation process on the basis of medical evidence alone, without consideration of the claimant's age, education, and work experience; and the House, Senate, and Conference reports all expressly state that no departure from that process was intended (except to the extent of requiring consideration of the combined effect of multiple impairments). That unambiguous ratification of the severity regulation is controlling here.

ARGUMENT

THE SEVERITY REGULATION CONSTITUTES A VALID EXERCISE OF THE SECRETARY'S AUTHORITY UNDER 42 U.S.C. 405(a) TO ISSUE RULES REGULATING THE RECEIPT OF EVIDENCE AND MANNER OF PROOF IN DISABILITY CASES AND TO GIVE CONTENT TO THE STATUTORY DEFINITION IN 42 U.S.C. 423(d)(1)(A) OF THE TERM "DISABILITY"

The severity regulation invalidated by the court of appeals in this case is an integral part of the five-step sequential evaluation process established by the Secretary of Health and Human Services to facilitate the fair, efficient, and uniform adjudication of the more than two million claims for disability benefits that are filed each year under the Social Security Act. The principle reflected in the regulation—that in appropriate circumstances a person

may be denied disability benefits on the basis of medical evidence alone—has been a feature of the disability program since its inception in 1954, and that principle has been endorsed by Congress on a number of occasions since that time. The requirement that the claimant make a showing on the basis of medical evidence that his impairment meets a specified threshold level of severity serves to ensure that disability benefits are paid only where the claimant's physical or mental impairment is found to be a substantial cause of his inability to work, and thereby to distinguish the Social Security disability program from unemployment compensation and similar systems that are not primarily premised on medical incapacity.

The severity regulation also serves an important screening function in the processing of scores of thousands of applications each month. The regulation makes it unnecessary for the decision-maker to engage in an individualized vocational evaluation where a medical assessment establishes that the claimant's impairment is sufficiently insubstantial that it reasonably could be expected not to preclude all substantial gainful activity, irrespective of the claimant's age, education, and work experience. "The need for efficiency is self-evident." *Heckler* v. *Campbell,* 461 U.S. at 461 n.2. In accordance with this premise, a number of courts of appeals have held that the severity regulation constitutes a valid administrative implementation of the statutory standard of disability. *McDonald* v. *Secretary of Health & Human Services,* No. 86-1288 (1st Cir. July 17, 1986), slip op. 10-20; *Hampton* v. *Bowen,* 785 F.2d 1308, 1311 (5th Cir. 1986); *Garza* v. *Heckler,* 771 F.2d 871, 873 (5th Cir. 1985); *Stone* v. *Heckler,* 752 F.2d 1099, 1101-1103 (5th Cir. 1985); *Farmer* v. *Secretary of Health & Human Services,* No. 85-5619 (6th Cir. July 11, 1986); *Salmi* v. *Secretary of Health & Human Services,* 774 F.2d 685, 691-692 (6th Cir. 1985); *Farris* v. *Secretary of Health & Human Services,* 773 F.2d 85, 89-90 (6th Cir.

1985); *Flynn* v. *Heckler,* 768 F.2d 1273, 1274-1275 (11th Cir. 1985); *Brady* v. *Heckler,* 724 F.2d 914, 918-920 (11th Cir. 1984); but cf. *McCruter* v. *Bowen,* 791 F.2d 1544 (11th Cir. 1986).[9]

These decisions of the various courts of appeals that have sustained the severity regulation are clearly correct. *Heckler* v. *Campbell,* 461 U.S. 458 (1983), establishes the

[9] The Fourth Circuit also has sustained decisions of the Secretary denying benefits based on a finding that the claimant's impairment was not severe, albeit without addressing the validity of the severity regulation. See *Gross* v. *Heckler,* 785 F.2d 1163 (1986); *Evans* v. *Heckler,* 734 F.2d 1012, 1014 (1984).

By contrast, in addition to the Ninth Circuit in this case, the Third, Eighth, and Tenth Circuits have invalidated the severity regulation on its face, rejecting the contention that it constitutes a reasonable measure for screening out claimants with relatively minor impairments. See *Wilson* v. *Secretary of Health & Human Services,* No. 85-5814 (3d Cir. July 14, 1986), slip op. 9-12; *Brown* v. *Heckler,* 786 F.2d 870, 871-872 (8th Cir. 1986); *Hansen* v. *Heckler,* 783 F.2d 170, 174-176 (10th Cir. 1986). The Seventh Circuit, in an Illinois-wide class action, also has invalidated the regulation as applied to certain categories of claimants. *Johnson* v. *Heckler,* 769 F.2d 1202, 1209-1213, reh'g en banc denied by an equally divided court, 776 F.2d 166 (1985), petition for cert. pending, No. 85-1442. Compare *Bunch* v. *Heckler,* 778 F.2d 396, 398-400 & n.4 (7th Cir. 1985). The Second Circuit, in a New York-wide class action, recently affirmed a preliminary injunction barring the application of the severity regulation, although the court purported not to finally resolve the question of the validity of the regulation because it reviewed the preliminary injunction under an abuse-of-discretion standard. *Dixon* v. *Heckler,* 785 F.2d 1102, 1106-1107 (1986), petition for cert. pending, No. 86-2. Application of the severity regulation also has been barred by a preliminary injunction entered almost two years ago in a Ninth Circuit-wide class action. *Smith* v. *Heckler,* 595 F. Supp. 1173 (E.D. Cal. 1984), appeal pending, No. 85-2178 (9th Cir.). Similar injunctive orders have been entered in other class actions. See *Wilson* v. *Secretary of Health & Human Services, supra; Campbell* v. *Heckler,* 620 F. Supp. 469 (N.D. Iowa 1985), appeal pending, No. 86-1090NI (8th Cir.); *Bailey* v. *Bowen,* No. 83-1797 (M.D. Pa. Mar. 11, 1986), appeal pending, No. 86-5038 (3d Cir.); *Mason* v. *Bowen,* No. 83-390 (D. Vt. May 21, 1986); *Pratt* v. *Heckler,* 629 F. Supp. 1496 (D.D.C. 1986).

governing framework for evaluating the validity of regulations promulgated by the Secretary to regulate the manner of proof in disability cases and to give content to the statutory definition of the term "disability." In *Heckler* v. *Campbell,* the Court considered the validity of the medical-vocational guidelines that are applied at step 5 of the sequential evaluation process. The Court observed that 42 U.S.C. 405(a) directs the Secretary to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. See 461 U.S. at 466. In the Court's view, Congress, through this directive, has " 'conferred on the Secretary exceptionally broad authority to prescribe standards' " for applying the statutory definition of the term "disability." *Ibid.,* quoting *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 43 (1981). "Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation," a court's review "is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." 461 U.S. at 466. The severity regulation plainly suffers from neither defect. To the contrary, the text of the Act and the legislative and administrative history of the relevant statutory and regulatory provisions lend overwhelming support to the regulation—far more so even than was the case with the medical-vocational guidelines that were unanimously sustained in *Heckler* v. *Campbell.*

A. THE VALIDITY OF THE SEVERITY REGULATION IS SUPPORTED BY THE STATUTORY DEFINITION OF THE TERM "DISABILITY" IN 42 U.S.C. 423(d)(1)(A), AS WELL AS OTHER PROVISIONS OF THE ACT, AND IS EXPRESSLY SANCTIONED BY THE SOCIAL SECURITY DISABILITY BENEFITS REFORM ACT OF 1984

The severity step of the sequential evaluation process is affirmatively supported by the text of a number of the

provisions of the Social Security Act that govern the disability program. The court of appeals failed to discuss those provisions, much less to consider their cumulative effect.

1. In the first place, the severity regulation employed at step 2 of the sequential evaluation process is directly tied to and faithfully implements the basic statutory definition of the term "disability" that applies in the Social Security disability program. That definition, which was enacted in the Social Security Amendments of 1954 (ch. 1206, § 106(d), 68 Stat. 1080), provides that the term "disability" shall mean—

> [the] inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]

42 U.S.C. 423(d)(1)(A).[10] The corresponding definition under the SSI program is identical. See 42 U.S.C. 1382c(a)(3)(A). Nothing in this generally worded definition casts any doubt on the validity of the severity regulation.

---

[10] In the 1954 amendments, Congress provided for the preservation of the right to old age and survivor's insurance during a period of extended disability—the so-called disability "freeze." Congress did not then provide for the payment of benefits to a person because of his disability. See H.R. Rep. 1698, 83d Cong., 2d Sess. 22-24 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 20-22 (1954). (Provisions for such a "freeze" previously were enacted on a contingent basis in Section 3(d) of the Social Security Amendments of 1952 (ch. 945, 66 Stat. 771), but those amendments did not take effect. See H.R. Conf. Rep. 2491, 82d Cong., 2d Sess. 9 (1952); 98 Cong. Rec. 9522 (1952) (remarks of Sen. Johnson); *id.* at 9661 (remarks of Rep. Reed).

The definition of the term "disability" enacted in the 1954 amendments is contained in 42 U.S.C. (& Supp. II) 416(i). That definition was carried forward verbatim in 42 U.S.C. 423(d)(1)(A), at issue here, when Congress enacted the Title II disability insurance benefits program in 1956. See Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. See note 20, *infra*.

The severity regulation informs the claimant:

> If you do not have an impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. 404.1520(c), 416.920(c). The term "basic work activities" is defined by regulation for these purposes to mean "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. 404.1521(b), 416.921(b). By way of amplification, the regulations include examples of such aptitudes and abilities: "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;" "[c]apacities for seeing, hearing, and speaking;" "[u]nderstanding, carrying out, and remembering simple instructions;" etc. 20 C.F.R. 404.1521(b), 416.921(b).

Although the regulations at issue here thus prescribe a threshold showing of severity that the claimant's impairment must satisfy based solely on the *medical* evidence of the claimant's condition (*i.e.*, without specific consideration of his age, education, and work experience), that severity is measured essentially in *vocational* terms—the impact that the impairment has on the claimant's ability to perform the "basic work activities" that are "necessary to do most jobs." The regulations therefore adhere and give content to the statutory definition: if the claimant has not shown that his impairment is so severe as to "significantly limit" his ability to perform the basic work functions necessary for most jobs, then he plainly has not

demonstrated, for purposes of the statutory definition, an "inability to engage in any substantial gainful activity by reason of [the] impairment" (42 U.S.C. 423(d)(1)(A)). See *Brown* v. *Heckler,* 786 F.2d at 873 (Bowman, J., concurring and dissenting). In other words, as the Secretary explained in the clarifying guidance contained in SSR 85-28 (discussed at page 10, *supra*), "[i]nherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA [substantial gainful activity] is not seriously affected" (Pet. App. 42a).

2. The court of appeals believed, however, that benefits cannot be denied in this manner on the basis of medical evidence alone and that the claimant's age, education, and work experience (which the court apparently regarded as the only "vocational" considerations) must be specifically considered in connection with every application for disability benefits. See Pet. App. 9a. This reasoning is seriously flawed for several reasons. In the first place, as we have just explained, the severity test at step 2 of the sequential evaluation process in fact does take vocationally related considerations into account, because the severity of an impairment must be measured in terms of its impact on the claimant's ability to perform basic work activities.

Furthermore, a number of provisions of the Act make clear that the claimant must demonstrate, on the basis of medical evidence, that he has a physical or mental impairment to which his alleged inability to work may properly be attributed. Only then has the claimant established the necessary predicate for the finding, required by 42 U.S.C. 423(d)(1)(A), that his alleged inability to engage in any substantial gainful activity is "by reason of" his impairment.

As an initial matter, Section 423(d)(1)(A) itself requires that the alleged impairment be "medically determinable." Moreover, 42 U.S.C. 423(d)(3) provides that for purposes

of the basic statutory definition of "disability," a "physical or mental impairment" is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." An applicant for disability benefits, such as respondent, bears the burden of establishing the existence of his impairment by such acceptable medical evidence. See *Mathews* v. *Eldridge,* 424 U.S. 319, 336 (1976). This burden is confirmed by 42 U.S.C. (Supp. II) 423(d)(5)(A), which provides that "[a]n individual shall not be considered to be under a disabiltiy unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." See *Eldridge,* 424 U.S. at 336. All of these provisions support the propriety of the Secretary's requirement that the claimant establish through medical evidence that his impairment meets a certain threshold level of severity.[11]

---

[11] The importance attached to medical evidence of the impairment is underscored by the amendments to 42 U.S.C. 423(d)(5) that were made by Section 3(a)(1) of the Social Security Disability Benefits Reform Act of 1984 [1984 Act], Pub. L. No. 98-460, 98 Stat. 1799. Those amendments added the following to the sentence in 42 U.S.C. (Supp. II) 423(d)(5)(A) that is quoted in the text (emphasis added):

> An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be *medical signs and findings,* established by *medically acceptable* clinical or laboratory diagnostic techniques, which show the existence of a *medical impairment* that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph * * *, would lead to a conclusion that the individual is under a disability. Objective *medical evidence* of pain or other symptoms established by *medically acceptable* clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.

This amendment was intended to codify the existing administrative policy regarding the evaluation of pain (see 20 C.F.R. 404.1529),

3. The court of appeals did not discuss the authority for the severity regulation contained in the basic definition of "disability" in 42 U.S.C. 423(d)(1)(A) and the additional statutory provisions, just quoted, that pertain to the claimant's burden of producing medical evidence of his impairment. Instead, in its brief discussion of the statutory text, the court of appeals looked only to 42 U.S.C. (Supp. II) 423(d)(2)(A), which it believed rendered the severity regulation invalid on its face. Section 423(d)(2)(A), which was enacted in the Social Security Amendments of 1967 (Pub. L. No. 90-248, § 158(b), 81 Stat. 868), provides in relevant part:

> an individual * * * shall be determined to be under a disability only if his physical or mental impairment or

---

pending completion of the study of methods for the evaluation of pain required by Section 3(b) of the 1984 Act (98 Stat. 1799-1800). See H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 28-29 (1984); S. Rep. 98-466, 98th Cong., 2d Sess. 23-24 (1984). The statutory provision regarding the evaluation of pain is made applicable to the SSI program by 42 U.S.C. (Supp. II) 1382c(a)(3)(H).

The relevance to the instant case of this amendment regarding the evaluation of pain is confirmed by the Senate Report, which explained that the amendment is consistent with the "clear intent" of Congress "that benefits be provided only to those who have *severe medical conditions* which preclude their engaging in substantial gainful activity." S. Rep. 98-466, *supra*, at 23 (emphasis added). See also *id.* at 24 (emphasis added) ("There must be evidence of an underlying medical condition and (1) there must be objective *medical evidence* to confirm the *severity* of the alleged pain arising from that condition or (2) the objectively determined *medical condition must be of a severity* which can reasonably be expected to give rise to the alleged pain."). Accord, 130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984) (remarks of Sen. Long).

The central importance of evidence of the claimant's medical condition is further confirmed by the new "medical improvement" standards enacted by Congress in Section 2 of the 1984 Act (98 Stat. 1794) for assessing the continued eligibility of persons who already are receiving benefits. 42 U.S.C. (Supp. II) 423(f)(1), 1382c(a)(5)(A). See H.R. Rep. 98-618, 98th Cong., 2d Sess. 11-13 (1984); S. Rep. 98-466, *supra*, at 8-10.

> impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *.

See also 42 U.S.C. 1382c(a)(3)(B). In the court of appeals' view, the reference in this provision to the claimant's "age, education, and work experience" requires a particularized consideration of those three factors in *every* disability determination, and benefits therefore cannot be denied solely on the basis of the medical evidence regarding the severity of the claimant's impairment. See Pet. App. 5a, 9a.

The court of appeals erred in believing that the language of Section 423(d)(2)(A) compels a specific consideration of the claimant's age, education, and work experience in every disability determination, irrespective of the nature of the medical evidence of the claimant's alleged impairment.[12] On its face, Section 423(d)(2)(A) merely states further conditions of eligibility that the claimant must satisfy in order for his application for benefits to be *granted*: Not only must he satisfy the requirements of the basic definition of "disability" in 42 U.S.C. 423(d)(1)(A); in addition, he will be found to be under a disability "only if" he is unable to do his previous work and any other kind of substantial gainful work which exists in the national economy. Conversely, however, Section 423(d)(2)(A) does not by its terms impose any conditions that must be

---

[12] The other courts of appeals that have invalidated the severity regulation likewise have relied primarily on the reference in 42 U.S.C. (Supp. II) 423(d)(2)(A) to the claimant's "age, education, and work experience." See *Wilson* v. *Secretary of Health & Human Services*, slip op. 9-13; *Johnson* v. *Heckler*, 769 F.2d at 1210-1211; *Hansen* v. *Heckler*, 783 F.2d at 174; *Brown* v. *Heckler*, 786 F.2d at 871-872 & n.4; cf. *Dixon* v. *Heckler*, 785 F.2d at 1104-1105. But see *Baeder* v. *Heckler*, 768 F.2d 547, 551-552 (3d Cir. 1985) (relying on 42 U.S.C. 423(d)(1)(A)).

satisfied in order for the claimant's application for benefits to be *denied,* at least where the Secretary has determined that the claimant has failed to satisfy the requirements of the basic definition of "disability" in Section 423(d)(1)(A) and implementing regulations. In this case, the Secretary has determined that respondent failed to satisfy the requirement in the regulations implementing Section 423(d)(1)(A) that her impairment must meet a threshold standard of severity. It therefore was unnecessary for the Secretary to proceed to the additional conditions of eligibility under Section 423(d)(2)(A), including an assessment of respondent's ability to perform her own past work and a specific consideration of respondent's age, education, and work experience for purposes of deciding whether she could perform any other substantial gainful work that exists in the national economy.[13]

Moreover, as SSR 85-28 makes clear, the severity regulation is fully consistent with 42 U.S.C. (Supp. II) 423(d)(2)(A) even if that provision were construed to limit the Secretary's power to deny an application where the claimant has failed to satisfy the eligibility requirements in Section 423(d)(1)(A) and implementing regulations. In SSR 85-28, the Secretary explained that an impairment is found to be "not severe" only when the medical evidence establishes that the impairment "would have no more than a minimal effect on [the] individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a). "Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be

[13] As we explain below (see pages 39-41, *infra*), this interpretation of Section 423(d)(2)(A) is confirmed by the legislative history of its enactment in 1967, which shows (i) that it was enacted because of congressional concern that the basic definition of "disability" in Section 423(d)(1)(A) had been given too broad a construction by the courts, and (ii) that Congress intended to reaffirm the primary importance of medical factors in the disability determination process.

not severe would not prevent him or her from engaging in SGA" (*ibid.*). As a result, the severity regulation operates to screen out those claimants who it may reasonably be presumed would be found not to be disabled if the sequential evaluation process were to proceed to a specific consideration at step 5 of their age, education, and work experience. See 43 Fed. Reg. 9296 (1978); *McDonald* v. *Secretary of Health & Human Services,* slip op. 11, 16-17; *Hampton* v. *Bowen,* 785 F.2d at 1311; *Farris* v. *Secretary of Health & Human Services,* 773 F.2d at 90; *Brady* v. *Heckler,* 724 F.2d 914, 920 (11th Cir. 1984) (quoting *Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations* (1980)).

4. The validity of the severity step of the disability determination process is in any event expressly confirmed by 42 U.S.C. (Supp. II) 423(d)(2)(C). That paragraph, which was added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984 (98 Stat. 1800), provides (emphasis added):

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient *medical severity* that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a *medically severe* combination of impairments, the combined effect of the impairments shall be considered throughout the disability determination process.[14]

The first sentence of this new paragraph clearly refers to the threshold determination of "medical severity" that is made at step 2 of the sequential evaluation process. And

[14] An identical provision applicable to the SSI program is contained in 42 U.S.C. (Supp. II) 1382c(a)(3)(G).

the second sentence just as clearly contemplates that the subsequent steps of the "disability determination process" (which include steps 4 and 5, at which the decision-maker would consider the claimant's ability to perform his past work and his age, education, and work experience) will be reached only "[i]f the Secretary *does* find a medically severe combination of impairments" (98 Stat. 1800 (emphasis added)). See *Johnson* v. *Heckler,* 776 F.2d at 170 (Easterbrook, J., dissenting from denial of rehearing en banc). In this case, because the Secretary found at step 2 that respondent did not have a medically severe impairment or impairments (Pet. App. 28a), it was unnecessary for the Secretary to proceed to the subsequent steps of the disability determination process.

5. In sum, the severity step of the sequential evaluation process is affirmatively supported by the text of the basic definition of the term "disability" in 42 U.S.C. 423(d)(1)(A) and by the other provisions of the Act that underscore the importance of medical evidence in the disability determination process. The regulation also is fully consistent with the further limitations on eligibility in 42 U.S.C. (Supp. II) 423(d)(2)(A), and it is expressly ratified by the new provision in 42 U.S.C. (Supp. II) 423(d)(2)(C) concerning the consideration of multiple impairments. The court of appeals' conclusion that the severity regulation conflicts with the text of the Act – which was reached in a two-sentence discussion of 42 U.S.C. (Supp. II) 423(d)(2)(A) alone (Pet. App. 9a) – therefore is completely without merit.[15]

[15] In addition to holding that the severity regulation conflicts with 42 U.S.C. (Supp. II) 423(d)(2)(A), the court of appeals also concluded that the regulation is inconsistent with various court of appeals decisions that it read to mandate that "disability determinations be made according to a two-step process, with the claimant first showing an inability to perform past relevant work, and the Secretary then showing that the claimant nevertheless retains the ability to do other work" (Pet. App. 10a-11a). This conclusion is without merit. Nothing in the Social Security Act suggests that the disability determination process must be

rigidly confined to just two such steps. To the contrary, under 42 U.S.C. 405(a), the Secretary has " 'exceptionally broad authority' " (*Heckler* v. *Campbell,* 461 U.S. at 466 (citation omitted)) to adopt rules "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases.

Nor does the Act mandate that a claimant may establish a "prima facie" case by showing that he is unable to do his past relevant work, thereby automatically shifting the burden to the Secretary to show that the claimant nevertheless can perform other work that exists in the national economy, as the court of appeals also seemed to believe (Pet. App. 10a, 11a). Indeed, as we show in this brief, the text and legislative history of the relevant provisions of the Social Security Act clearly establish that it is also part of the claimant's initial burden to show on the basis of medical evidence that he has an impairment that satisfies a threshold level of severity. Moreover, of the relevant provisions of the Social Security Act, it is only 42 U.S.C. (Supp. II) 423(d)(2)(A) that expressly refers to the claimant's inability to perform not only his own past work, but also any other substantially gainful work that exists in the national economy. Section 423(d)(2)(A) was enacted in 1967 to make explicit these further conditions of eligibility that must be satisfied before an application for benefits may be allowed. See pages 25-27, *supra.* Section 423(d)(2)(A) therefore does not excuse the claimant from satisfying any other eligibility requirements that are imposed by the basic definition of disability in Section 423(d)(1)(A) and implementing regulations, including the requirement that the claimant establish the existence of a severe impairment. Of course, if these other requirements are satisfied and the sequential evaluation proceeds to steps 4 and 5, the burden-shifting rule to which the court of appeals referred is applicable.

In any event, as the Secretary explained in SSR 85-28 with respect to the language of the current severity regulation (Pet. App. 43a):

> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work.

Moreover, SSR 85-28 states that under current procedures, if the "evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work," the claim will not be denied at step 2 and the decision-maker will undertake "further evaluation of the individual's ability to do other work considering age, education and work experience" (*ibid.*). Compare *McDonald* v. *Secretary of Health & Human Services,* slip op. 17-19 & nn.7-9.

B. THE LEGISLATIVE HISTORY OF THE RELEVANT AMENDMENTS TO THE SOCIAL SECURITY ACT AND THE ADMINISTRATIVE HISTORY OF THE DISABILITY PROGRAM CONFIRM THE VALIDITY OF THE SEVERITY REGULATION

The validity of the severity step of the sequential evaluation process is further confirmed by the legislative history of the relevant amendments to the Social Security Act and the administrative history of the disability program since 1954. At virtually every turn, there is strong support for the regulation, and literally millions of claims have been tested against the threshold severity standard since the sequential evaluation process was formally adopted in 1978. It is far too late in the experience of the disability program for a court to hold that the severity regulation is beyond the Secretary's statutory authority. Yet there is no indication that the court of appeals gave any weight to these considerations in its almost casual invalidation of one of the most broadly applicable administrative measures on the books.

1. The basic statutory definition of the term "disability," which was enacted by Congress in 1954 and carried forward in 42 U.S.C. 423(d)(1)(A) in 1956 (see page 20 & note 10, *supra*), is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The Senate and House reports on the 1954 amendments both stress that this definition limits the program's protection to "[o]nly those individuals who are totally disabled by illness, injury, or other physical or mental impairment" (H.R. Rep. 1698, *supra*, at 23; S. Rep. 1987, *supra*, at 20. This emphasis on "total" disability obviously supports the Secretary's adoption of a mechanism for screening out those claimants whose impairments are relatively insignificant from a

medical perspective and who therefore are, at most, only partially disabled.[16]

Moreover, the Senate and House Reports on the 1954 amendments contain a detailed explanation of the statutory definition of "disability" that is directly relevant to the issue in this case:

> There are two aspects of disability evaluation: (1) *There must be a medically determinable impairment of serious proportions* which is expected to be of long-continued and indefinite duration or to result in death, and (2) there must be a present inability to en-

---

[16] The purpose to limit protection to persons having a "total" disability was consistently stressed during the consideration of various disability proposals in the years prior to 1954. See, *e.g.*, *Report of the Committee on Economic Security*, H.R. Doc. 110, 76th Cong., 1st Sess. 8 (1939); *Annual Message of the President on Health Security*, H.R. Doc. 120, 76th Cong., 1st Sess. 16 (1939); Senate Comm. on Finance, *Recommendations for Social Security Legislation*, S. Doc. 208, 80th Cong., 2d Sess. 74-75 (1949) [hereinafter cited as S. Doc. 208].

In 1949, the House of Representatives passed a bill (H.R. 6000, 81st Cong., 1st Sess. § 107 (1949)) that provided for the payment of disability insurance benefits to "totally disabled" individuals. See H.R. Rep. 1300, 81st Cong., 1st Sess. 7, 27-30, 104, 107 (1949); 95 Cong. Rec. 13915-13916 (1949). However, the Senate rejected this provision, largely because of concerns about its potential cost. S. Rep. 1669, 81st Cong., 2d Sess. 4 (1950); 96 Cong. Rec. 8900-8904 (1950). As a compromise, Congress added a new Title XIV to the Act to provide grants to the states for assistance to the "permanently and totally disabled." Social Security Act Amendments of 1950, ch. 809, § 351, 64 Stat. 555 *et seq*. That program remained in effect until 1974 (see 42 U.S.C. (1970 ed.) 1351 *et seq*.), when it was replaced by the SSI program that had been enacted in 1972. See note 23, *infra; Atkins* v. *Rivera*, No. 85-632 (June 23, 1986), slip op. 2 n.2.

In 1952, Congress enacted the contingent disability "freeze" provision, which did not go into effect. See note 10, *supra*. The term "disability" was defined under that provision in a manner identical to that now contained in 42 U.S.C. 423(d)(1)(A). See § 3(d), 66 Stat. 771. Once again, the provision was viewed as furnishing protection only for the "totally disabled." H.R. Rep. 1944, 82d Cong., 2d Sess. 7 (1952); S. Rep. 1806, 82d Cong., 2d Sess. 2 (1952).

> gage in substantial gainful work *by reason of* such impairment * * *. The physical or mental impairment *must be of a nature and degree of severity* sufficient to justify its consideration as the cause of failure to obtain any substantial gainful work. Standards for evaluating the severity of disabling conditions will be worked out in consultation with the State agencies.

H.R. Rep. 1698, *supra,* at 23 (emphasis added); S. Rep. 1987, *supra,* at 21 (emphasis added).

The first of the two "aspects" of the disability determination articulated by the congressional reports strongly supports the Secretary's adoption of an independent threshold requirement that the impairment be of "serious proportions" from a medical perspective alone. Only if that condition is met should it be necessary for the decision-maker to consider the second "aspect" of the disability determination: whether the claimant is unable to work by reason of "such impairment"—*i.e.,* by reason of an impairment found to be of "serious proportions."[17] The second sentence quoted from the committee reports likewise makes clear Congress's intent that the impairment must rise to a certain threshold level of severity before it

[17] The bill also provided that a person would be disabled if he satisfied a special statutory standard of blindness. See 42 U.S.C. 416(i)(1)(B). However, the reports state:

> A person who does not meet the statutory definition [of blindness], but who nevertheless has a *severe* visual impairment would be in the same position as all other disabled persons, that is, he may qualify for a period of disability under the general definition of disability if he is unable to engage in any substantially gainful activity by reason of his impairment.

H.R. Rep. 1698, *supra,* at 23 (emphasis added); S. Rep. 1987, *supra,* at 21 (emphasis added). The obvious implication is that if the claimant's visual impairment were not "severe" (and the claimant had no other severe impairment), it would be unnecessary for the Secretary even to consider whether the claimant could engage in substantial gainful activity.

may even be considered as the cause of the claimant's alleged inability to work. This principle affords some measure of assurance that the claimant's alleged inability to work is actually "by reason of" his impairment, as the Act requires, and not merely coincidental with the existence of a relatively minor ailment.[18] Finally, the third sentence in the passage supports the Secretary's decision to promulgate standards for "evaluating the severity" of impairments that, inter alia, require the claimant to make a threshold showing that his impairment significantly limits his ability to do basic work functions.[19]

[18] Representative Kean made the same point during the floor debates (100 Cong. Rec. 7445 (1954) (emphasis added)):

> There are two aspects to the disability evaluation: The physical or mental impairment must be (1) of a nature and *degree of severity to justify consideration of its alleged causal connection with failure to obtain any substantially gainful work,* and (2) it must actually result in loss of substantially gainful work * * *.

[19] It was anticipated from the inception of the disability program that the Secretary would promulgate regulations to implement the statutory standard of disability. See S. Doc. 208, at 74 ("The concept of permanent disability which the Council envisages should be defined in legislation only in broad terms and should be worked out in detail through regulations."); *id.* at 75 ("The exact limits of what constitutes 'substantial gainful activity' should, in the early years of the program, at least, be defined by regulations."); 96 Cong. Rec. 8903 (1950) (remarks of Sen. Douglas) (amendment to make mandatory the development of "medical guides"). See also House Comm. on Ways and Means, 93d Cong., 2d Sess., *Staff Report on the Disability Insurance Program* 6 (Comm. Print 1974) ("The orginal idea was that the broad language of the statutory definition would be amplified by regulations based on operational experience."); *id.* at 45-46, 50 (same); Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 2d Sess., *Administration of the Social Security Disability Insurance Program: Preliminary Report* 14, (Comm. Print 1960) [hereinafter cited as *Preliminary Report*] (same); S. Doc. 10, 77th Cong., 1st Sess. Pt. 3, at 53 (1941) (noting desirability of detailed regulations under the Social Security program); *Heckler* v. *Campbell,* 461 U.S. at 466 n.10.

2. The congressional intent that a finding of non-disability may be based on medical factors alone—where the claimant has failed to produce medical evidence that he has an impairment of serious proportions—was reflected in the *Disability Freeze State Manual,* which HEW issued on March 16, 1955, to guide the state agencies in making disability determinations under the 1954 Act. The *Manual* stated by way of introduction (*id.* § 304.B (emphasis added)):

> In the great majority of cases the State agency will be able to evaluate the applicant's impairment or combination of impairments on the basis that it meets or *does not meet the level of severity* presented in the listing of [presumptively disabling] impairments. [See §§ 321-323, 382-393.] Where a realistic evaluation cannot be made on the basis of the *medical factors* plus cessation of work, the State agency should consider non-medical factors described in the following sections. [See §§ 324-328, discussing age, education, and experience.]

This passage makes clear that, in appropriate circumstances, a person could be found not to be disabled on "medical factors" alone (if his impairment "does not meet the level of severity" in the listings) and that consideration of the "non-medical" factors of age, education, and experience would be required only if a "realistic evaluation" could not be made on the basis of medical factors alone. See also *id.* § 314.A ("The impairment must be sufficiently severe to be the cause of inability to work."); *id.* § 321.A. ("great emphasis should be placed on the nature and severity of the medical impairment").[20]

Congress has now expressed in statutory form its intent that the disability program be administered according to such standards established by the Secretary. See 42 U.S.C. 421(a)(2), 42 U.S.C. (Supp. II) 421(j) and (k).

[20] The *Disability Freeze State Manual* was furnished to the Senate Committee on Finance in connection with its consideration of the disability benefits program that was enacted in the Social Security Amendments of 1956. See *Social Security Amendments of 1955: Hearings on H.R. 7225 Before the Senate Comm. on Finance,* 84th Cong., 2d Sess. 39 (1956). We have lodged a copy of the relevant provisions of the 1955 *Disability Freeze State Manual* with the Clerk of this Court.

This contemporaneous interpretation of the statutory standard of disability was subsequently incorporated into

In the Social Security Amendments of 1956, Congress incorporated verbatim into 42 U.S.C. 423(d)(1)(A) the definition of "disability" it had enacted two years earlier in 42 U.S.C. 416(i). See note 10, *supra.* The disability determination process was not discussed in detail in the legislative history of the Social Security Amendments of 1956, as it was in the committee reports on the 1954 amendments. The House Report did stress, however, that the bill provided for "a conservative program of disability insurance benefits" and that under the statutory eligibility standard, "an individual who is able to engage in any substantial gainful activity will not be entitled to disability-insurance benefits even though he is in fact severely disabled." H.R. Rep. 1899, 84th Cong., 1st Sess. 5 (1955). The latter passage suggests that the existence of a severe impairment was regarded as a necessary but not sufficient condition of eligibility.

Although the bill passed the House without debate (101 Cong. Rec. 10768-10772 (1955)), the Senate Finance Committee deleted the disability benefits provision. See S. Rep. 2133, 84th Cong., 2d Sess. 3-4 (1956). However, a disability benefits amendment was adopted on the Senate floor (102 Cong. Rec. 13037-13056 (1956)), retained in conference (H.R. Conf. Rep. 2936, 84th Cong., 2d Sess. 25-26 (1956)), and enacted into law. Senator George, the principal proponent of the amendment in the Senate, stressed that "the applicant for benefits must present sound and convincing medical evidence that he has a medically determinable impairment"; that the medical evidence "must indicate not only the nature of the impairment but also its severity"; and that the claimant "must prove his case" (102 Cong. Rec. 13038-13039, 15107 (1956)). The Members also repeatedly stressed during the floor debates that benefits would be available for the "totally disabled." See, *e.g.,* 102 Cong. Rec. 13037, 15107 (1956) (remarks of Sen. George); *id.* at 12884, 13044 (Sen. Lehman); *id.* at 13022 (Sen. Jackson); *id.* at 13024 (Sen. McNamara); *id.* at 14830 (Rep. Reed); *id.* at 14831 (Reps. Jenkins and Zablocki); *id.* at 14832 (Reps. Rodino and Henderson); *id.* at 14833 (Rep. Roosevelt).

the formal disability regulations promulgated by the Secretary in 1960. 25 Fed. Reg. 8100. This regulation provided in pertinent part (20 C.F.R. 404.1502(a) (1961) (emphasis added)):

> Whether or not an impairment in a particular case constitutes a disability * * * is determined from all the facts of that case. *Primary consideration is given to the severity of the individual's impairment.* Consideration is also given to such other factors as the individual's age, education, training and work experience. However, *medical considerations alone may justify a finding that the individual is not under a disability* where the only impairment is a slight neurosis, slight impairment of sight or hearing, or similar abnormality or combination of slight abnormalities.

This regulation, promulgated pursuant to the Secretary's broad authority under 42 U.S.C. 405(a), gave content to the statutory standard of disability based on the accumulated experience to that date in the administration of the disability program.[21] It therefore has particular signifi-

[21] The administrative interpretation of the statutory standard of disability was brought to Congress's attention prior to the promulgation of the regulations in 1960. During oversight hearings in 1959, Robert Ball, then-Deputy Director of the Bureau of Old-Age and Survivors Insurance, explained:

> The "by reason of any medically determinable physical or mental impairment" is really the heart of the definition. * * * [T]he distinction between this program and a kind of unemployment insurance or unemployment insurance for partially disabled people is that we have to be able to say that the medically determinable physical and mental impairment is itself *serious enough* so that the individual does not really have the capacity to engage in substantial gainful activity.

Administration of Social Security Disability Insurance Program: Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess. 28 (1959) (emphasis added). See also *id.* at 29 (inability to engage in substantial gainful activity must be "primarily by reason of" a medically determinable impairment). Another representative of the Bureau testified regarding the medical "guides," which contained listings of presumptively disabling impairments similar to those now employed at step 3 of the sequential evaluation process (*id.* at 342 (emphasis added)):

> We believe these guides enable us to adjudicate quickly and uniformly those applicants who clearly meet the impairment characteristics as defined by the law. A claimant whose evidence shows that [his] impairment obviously is not the cause for not working can be easily excluded without using guides. These two techniques—allowing those who meet or parallel the level of the guides and excluding claimants with short duration and *minimal impairments*—limit more extensive development and evaluation to a smaller segment of claims.

This witness thus made clear that a full evaluation of a claim—including an assessment of the claimant's age, education and work experience—was not required where he had only a "minimal impairment."

In its March 1960 report to the full Committee on Ways and Means based on the oversight hearings in 1959, the Subcommittee discussed the Bureau's approach in terms that also support an independent severity requirement. See *Preliminary Report XVII* (emphasis added), quoting informal statement of Bureau offical (" 'such nonmedical factors as age, education, vocational skills, work experience, etc., must play a part in deciding whether a given individual with a *severe* mental or physical impairment can or cannot engage in substantial gainful activity' "); *id.* at 19 ("the individual's impairment must be the primary cause of the lack of capacity"); *id.* at 20 ("major medical impairments"). After the Subcommittee submitted its report (and after the Secretary promulgated the regulations discussed in the text), Congress passed the Social Security Amendments of 1960 (Pub. L. No. 86-778, 74 Stat. 924 *et seq.*), which included amendments to the disability program (Tit. IV, 74 Stat. 967-970). But although the House and Senate Reports on the 1960 amendments called attention to the extensive study of the disability program undertaken by the House Subcommittee (H.R. Rep. 1799, 86th Cong., 2d Sess. 12 (1960); S. Rep. 1856, 86th Cong., 2d Sess. 15 (1960)), Congress did not include any amendments to overturn the Secretary's implementation of the statutory standard of disability. This " 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the in-

cance here. Moreover, the regulation, which was revised slightly in 1965 (33 Fed. Reg. 11749), remained in effect in essentially identical form until 1978, when the sequential evaluation regulations were formally adopted. See pages 42-43, *infra*. Thus, the interpretation of the Act reflected in the current severity regulation—that a claim may be denied on the basis of medical evidence alone if the impairment is relatively minor—also has been a consistent and longstanding one, and it accordingly is entitled to particular deference by the courts. *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 10; *Pattern Makers* v. *NLRB*, No. 83-1894 (June 27, 1985), slip op. 19-20; *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844-845 (1984).[22]

---

terpretation is the one intended by Congress.' " *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11 (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

[22] Regulations promulgated in 1957 likewise stated that "primary consideration is given to the severity of [the] impairment," but that "[c]onsideration is also given to such other factors as the individual's education, training and work experience." 22 Fed. Reg. 4362 (1957), adding 20 C.F.R. 404.1501(b) (1958). The 1957 regulations did not expressly state that a claim could be denied on the basis of medical evidence alone. However, 20 C.F.R. 404.1501(c) (1958), as added in 1957, did provide (22 Fed. Reg. 4362):

> It must be established by medical evidence, and where necessary by appropriate medical tests, that the applicant's impairment results in such a lack of ability to perform significant functions—such as moving about, handling objects, hearing or speaking, or, in the case of a mental impairment, reasoning or understanding—that he cannot, with his training, education and work experience, engage in any kind of substantial gainful activity.

This focus on the effect the impairment has on the claimant's ability to perform "significant functions" (and the examples of such functions) presaged the current severity regulation's reference to "basic work activities" and the accompanying examples of the abilities and aptitudes embraced by that term.

3. In 1967, Congress reexamined the operation of the disability program and added 42 U.S.C. 423(d)(2)(A) to the Act. § 158(b), 81 Stat. 868. The court of appeals interpreted Section 423(d)(2)(A) essentially as a liberalization of the disability requirements, under which the Secretary is barred from denying benefits based on medical evidence, without also considering the claimant's age, education, and work experience. Pet. App. 5a, 9a. There is no support for this proposition. To the contrary, the legislative history demonstrates that Congress intended in 1967 to establish more stringent standards of disability and to "reemphasize the predominant importance of medical factors in the disability determination." S. Rep. 744, 90th Cong., 1st Sess. 48 (1967). This background obviously does not support the court of appeals' view that the enactment of Section 423(d)(2)(A) was intended to *prohibit* a policy of denying benefits on the basis of medical evidence alone in appropriate circumstances.

Moreover, when the 1967 amendments were enacted, the regulations promulgated by the Secretary in 1960 to implement the basic statutory definition of "disability" were already in effect. Those regulations, quoted above, expressly provided that medical considerations alone would support a finding of no disability. 20 C.F.R. 404.1502(a) (1966). Yet Congress did not amend 42 U.S.C. 423(d)(1)(A) or otherwise disapprove the formal and settled administrative construction of the term "disability" reflected in those regulations. When Congress thoroughly reexamines a statutory program and revises it in certain respects, Congress is generally understood to have approved those aspects of the program that it left unaltered. See *CFTC* v. *Schor*, slip op. 11; *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 11; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982).

That conclusion is particularly compelling here. As we have explained (see pages 25-26, *supra*), the new 42 U.S.C. 423(d)(2)(A), by its terms, simply made explicit certain *additional* conditions of eligibility: Not only must the claimant establish that he has a mental or physical impairment of "serious proportions" and of "a nature and degree of severity" sufficient to justify its consideration as the cause of his failure to obtain work, as the committee reports on the 1954 amendments explained (see H.R. Rep. 1698, *supra,* at 23; S. Rep. 1987, *supra,* at 21 (both quoted at pages 31-32, *supra*)); under Section 423(d)(2)(A), a claimant who meets that requirement also must demonstrate that his "impairment or impairments are of *such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. (Supp. II) 423(d)(2)(A) (emphasis added)). Nothing in this further prerequisite undermines the validity of the preexisting threshold requirement under Section 423(d)(1)(A) that the claimant's impairment be severe from a medical perspective.

The legislative history in fact confirms that Congress intended no such departure from settled practice. The House and Senate Reports both explained the method for determining disability that Congress contemplated:

> The bill would provide that such an individual would be disabled only if it is shown [i] *that he has a severe medically determinable physical or mental impairment or impairments;* [ii] that if, despite his impairment or impairments, an individual still can do his previous work, he is not under a disability; and [iii] that if, considering the severity of his impairment together with his age, education, and experience, he has the ability to engage in some other type of substantial gainful work that exists in the national economy even though he can no longer do his previous work, he also is not under a disability.

S. Rep. 744, *supra*, at 48-49 (emphasis added); H.R. Rep. 544, 90th Cong., 1st Sess. 30 (1967) (emphasis added). This congressional description is a virtual blueprint for the sequential evaluation process that was formally adopted by the Secretary in 1978. The emphasized passage plainly supports the requirement at step 2 of the current process that a claimant make a threshold showing that his impairment is "severe" before it is necessary for the Secretary to determine at the next steps whether the claimant can do his past work and whether, in light of his age, education, and work experience, he can perform any other substantially gainful work that exists in the national economy.

Accordingly, when the Secretary in 1968 promulgated comprehensive disability regulations to take account of the 1967 amendments, he carried forward the preexisting authorization in 20 C.F.R. 404.1502(a) for benefits to be denied on medical evidence alone. 33 Fed. Reg. 11749, 11750 (1968). At the very least, the Secretary's retention of this regulation in 1968 reflected a reasonable construction of the 1967 amendments and their legislative history as not prohibiting the use of the regulation. The courts therefore are required to respect that construction. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 844-845.[23]

---

[23] When Congress enacted the SSI program in 1972 (Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1471), it incorporated into 42 U.S.C. 1382c(a)(3)(A) and (B) the definition of the term "disability" from 42 U.S.C. 423(d)(1)(A) and the further conditions on eligibility in 42 U.S.C. 423(d)(2)(A), without expressing any disapproval of the longstanding implementation of the statutory standard of disability contained in the Secretary's regulations. See S. Rep. 92-1230, 92d Cong., 2d Sess. 384 (1972). When Congress incorporates statutory provisions from one program into another in this manner, it is presumed to be aware of the interpretation of those provisions and to intend that interpretation to be applied under the second program.

4. In 1978, the Secretary promulgated the first version of the regulations that formally established the sequential evaluation process for adjudicating disability claims. See 43 Fed. Reg. 55349; *Heckler* v. *Campbell,* 461 U.S. at 460. Those regulations required the decision-maker to determine at step 2 whether the claimant's impairment was "severe," and they explained that "[a] medically determinable impairment(s) is not severe [if it] does not significantly limit an individual's physical or mental capacity to perform basic work-related functions." 43 Fed. Reg. 55351 (1978), adding 20 C.F.R. 404.1503(c) (1979). The Secretary stressed that this definition was intended to be only a "clarification" of the prior regulation, which allowed a claim to be denied where the claimant's impairment was "slight" (43 Fed. Reg. 55353 (1978)); that "there is no intention to alter the levels of severity for a finding of * * * not disabled on the basis of medical considerations alone" (*ibid.*; see also *id.* at 9297); and that the regulation refers to impairments that "have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective of his or her age, education, and work experience" (*id.* at 9296).[24] The same severity concept was carried forward again in 1980,

Lorillard v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress's action in 1972 thus lends still further support to the validity of the severity regulation.

[24] In a study conducted in 1976, the Comptroller General had criticized as vague the reference in the then-existing regulations to "slight" impairments, and he recommended that the regulations be clarified, with appropriate examples, in order to promote uniformity of decision-making. *Report of the Comptroller General: The Social Security Administration Should Provide More Management and Leadership in Determining Who Is Eligible For Disability Benefits* 10-11 (1976). The 1978 revisions met those concerns by specifying that the severity of an impairment should be measured not in the abstract (*e.g.*, in terms of whether it is "slight"), but rather in terms of its impact on the ability of the claimant to perform basic work-related functions.

when the Secretary revised the disability regulations. See 45 Fed. Reg. 55574 (1980), adding 20 C.F.R. 404.1520 and 404.1521 (1981). The Secretary explained that the more detailed provisions were expected to result in "greater program efficiency" by limiting the number of cases in which it would be necessary to follow the full vocational evaluation procedures in 20 C.F.R. 404.1545 to 404.1568 and 416.945 to 416.968 (1981). See 45 Fed. Reg. 55574 (1980).

5. It was against this background that Congress thoroughly studied the Social Security disability program in the late 1970's and early 1980's and extensively revised certain of the governing statutory provisions. *Heckler* v. *Day*, 467 U.S. 104, 113-118 (1984). Although Congress was fully aware at that time of the sequential evaluation process, and specifically of the severity step in that process,[25] it did not include in the disability amendments of 1980 and 1982 any provision to reject the severity regulation. See Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.*; Act of Jan. 12, 1983, Pub. L. No. 97-455, §§ 2-7, 96 Stat. 2498-2502. This failure by Congress is itself " 'persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC* v. *Schor*, slip op. 11 (citation omitted). But in addition, the Senate Report on the 1980 amendments expressly reaffirmed that "[t]he 1967 amendments were intended to emphasize the role of medical facts in the determination of disability," and it quoted extensively from the Senate report on the 1967 amendments, which stated that a claimant must be shown to have " 'a severe medically determinable physical or

[25] See. *e.g. Disability Insurance Legislation: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 62-63, 82 (1979); Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Status of the Disability Insurance Program* 9-10, 18, 48 (Comm. Print 1981); Senate Comm. on Finance, 97th Cong., 2d Sess., *Staff Data and Materials Related to the Social Security Disability Insurance Program* 76-78, 110-112 (Comm. Print 1982).

mental impairment or combination of impairments.' " S. Rep. 96-408, 96th Cong., 1st Sess. 13 (1979), quoting S. Rep. 744, *supra*, at 48 (quoted at pages 40-41, *supra*).

The most significant recent development, however, is the enactment of the Social Security Disability Benefits Reform Act of 1984. As we shall show, Congress specifically considered the severity regulation when it passed the 1984 Act and mandated one change in the application of the regulation by requiring consideration of the combined effect of separate impairments; but Congress otherwise expressed its approval of the severity step as a reasonable screening mechanism. Indeed, as we have explained (pages 27-28, *supra*), Congress effectively ratified the severity step in the text of Section 4 of the 1984 Act (98 Stat. 1800). The new statutory provisions added by Section 4 (see 42 U.S.C. (Supp. II) 423(d)(2)(C), 1382c(a)(3)(G)) expressly contemplate that the claimant may be required to demonstrate that his impairments are of "sufficient medical severity" to warrant their consideration as the basis of eligibility, and that the subsequent steps of the "disability determination process" will be reached only if the Secretary first finds a "medically severe" impairment or combination of impairments.

The legislative history of Section 4 of the 1984 Act dispels any possible doubt about Congress's intent in 1984 to preserve the severity step of the sequential evaluation process. The Senate report, for example, states that under "[p]resent law," "[m]edical considerations alone can justify a finding of ineligibility where the impairment[ ] is not severe," and that "[a]n impairment is nonsevere if it does not significantly limit the individual's physical or mental capacity to perform basic work-related functions." S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984). The latter passage, of course, is a virtually verbatim paraphrasing of the severity regulation. The report then states (*ibid.* (emphasis added)):

> [T]he Committee wishes to emphasize that the new rule [requiring consideration of multiple impairments] is to be applied in accordance with the existing sequential evaluation process and is not to be interpreted as authorizing a departure from that process. As the Committee stated in its report on the 1967 amendments, an individual is to be considered eligible "only if it is shown that he has a severe medically determinable physical or mental impairment or impairments."[26] *The amendment requires the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe. If they are not, the claim must be disallowed.* Of course, if the Secretary does find a medically severe combination of impairments, the combined impact of the impairments would also be considered during the remaining stages of the sequential evaluation process.

The House Report likewise contains an extensive discussion of the sequential evaluation process (H.R. Rep. 98-618, 98th Cong., 2d Sess. 6-8 (1984)), which reflects the committee's understanding that if the claimant does not have a "severe impairment," the process "goes no further" (*id.* at 6). To be sure, as the court of appeals observed (Pet. App. 9a-10a), the House Report does express the committee's "concern[]" that the Social Security Administration had been criticized for applying "very strict criteria" of severity at step 2, without fully evaluating the individual's ability to work (H.R. Rep. 98-618, *supra*, at 7), and the Report notes that "[t]his criticism ha[d] been particularly strong in the case of multiple impairments" (*id.* at 6). But the Report at the same time makes clear the committee's view "that in the interests of reasonable administrative flexibility and efficiency, a determination that

---

[26] Quoting S. Rep. 744, *supra*, at 48, quoted at page 40, *supra*.

a person is not disabled may be based on a judgment that the person has no impairment, or that the impairment or combination of impairments [is] slight enough to warrant a presumption that the person's ability to work is not seriously affected" (*id.* at 8). The Report recognizes that "[t]he 'current sequential evaluation' process allows such a determination," and states that "the committee does not wish to eliminate or seriously impair the use of that process" (*ibid.*).

Accordingly, the House, like the Senate, mandated a change in the severity step of the sequential evaluation process only to the extent of requiring consideration of the combined effect of multiple impairments. In all other respects, the House, again like the Senate, left the severity step intact and endorsed its continued use,[27] although the House committee noted that the Secretary planned to reevaluate the criteria for nonsevere impairments and "urge[d] that all due consideration be given to revising those criteria to reflect the real impact of impairments upon the ability to work" (H.R. Rep. 98-618, *supra*, at 8).

In light of the agreement of the House and Senate, it is not surprising that the Conference Committee likewise preserved and endorsed the use of the severity step, modifying it only to the extent of requiring consideration of the combined effect of multiple impairments. Thus, the Conference Report recognizes that "[u]nder current policies, if a determination is made that a claimant's impairment is not severe, the consideration of the claim ends at that

[27] Both the House and Senate did so despite criticism of the severity step during the hearings. See *Social Security Disability Insurance: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 197-205 (1983); *Social Security Disability Insurance Program: Hearings Before the Senate Comm. on Finance*, 98th Cong., 2d Sess. 234-237 (1984). Compare *Heckler* v. *Day*, 467 U:S. at 114 n.24.

point" (H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 30 (1984)). The Conference Report then continues (*ibid.* (emphasis added)).

> The conferees also believe that in the interests of reasonable administrative flexibility and efficiency, a determination that an individual is not disabled may be based on a judgment that an individual has no impairment, or that the *medical severity of his impairment or combination of impairments is slight enough to warrant a presumption, even without a full evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current "sequential evaluation process" allows such a determination and the conferees do not intend to either eliminate or impair the use of that process.* The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for nonsevere impairments and expect that the Secretary will report to the Committees the results of this evaluation.

Contrary to the court of appeals' view (Pet. App. 8a-9a), it is difficult to see how Congress in 1984 could more clearly have expressed its intent to permit continued use of the severity step based on medical evidence alone, and not to require the decision-maker at that step either to consider whether the claimant can perform his own past work or to take into account the claimant's age, education, and work experience.[28] The fact that Congress recognized

[28] This conclusion is confirmed by the remarks of Senator Long (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)):

> The conference agreement, with minor language changes of a technical nature, follows the Senate approach. This language clearly indicates that Congress envisions a sequential approach to evaluating disability. The individual must first demonstrate the existence of an impairment or combination of impairments which are sufficiently severe from a medical standpoint as to meet the Secretary's criteria as to what could potentially be a disabling

that the *Secretary* intended to reevaluate the criteria for determining what impairments are severe does not authorize a *court* to invalidate the regulation altogether, as the court below did in this case (Pet. App. 10a).[29]

Indeed, during the floor debate on the Conference Report, Senator Long, a ranking member of the Conference Committee, specifically observed that "[s]ome courts * * * have ruled that the Secretary cannot deny

---

condition. If, and only if, the individual meets this test, there would be a further evaluation as to whether that condition or combination of conditions does in fact preclude him from engaging in substantial work activity in the light of his age, education and work experience.

No Senator or Representative expressed a contrary view. Compare *id.* at H9836 (remarks of Rep. Pickle, the House floor manager) (combined effect of impairments must be considered in determining whether the claimant's impairments are "medically severe enough" to qualify him for benefits).

[29] The Secretary has taken several steps in furtherance of the reevaluation to which the House and Conference Reports referred. First, in April 1985, the Secretary rescinded SSR 82-55 (1982), which had provided a list of illustrative examples of impairments generally considered to be non-severe. See SSR 85-III-II, at 47 (Apr. 1985). The court of appeals cited this ruling (Pet. App. 10a-11a n.8), but without noting that it had been rescinded. Second, in November 1985, the Secretary issued SSR 85-28, discussed at pages 10, 26-27, *supra*. SSR 85-28 emphasizes that a finding of "not severe" is made at step 2 when "medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a). This description of the manner in which the severity regulation is to be applied clearly comports with the House Report's urging that the criteria for identifying non-severe impairments "reflect the real impact of impairments upon the ability to work" (H.R. Rep. 98-618, *supra*, at 8). In addition, SSR 85-28 cautions adjudicators resolving disability claims at the administrative level that "[g]reat care" should be used in applying the non-severe concept (Pet. App 44a) and that denials at step 2 are appropriate only when the medical evidence clearly establishes that the impact of medical impairments is minimal or slight (*id.* at 42a).

claims solely on the basis that the individual has no severe medical condition but must always make an evaluation of vocational capacities" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)).[30] But Senator Long stressed that the Senate bill, after which the conference bill was patterned (see note 28, *supra*), had been "carefully drawn to reaffirm the authority of the Secretary to limit benefits to only those individuals with conditions which can be shown to be severe from a strictly medical standpoint—that is, without vocational evaluation" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)). The decision of the court of appeals cannot be reconciled with this considered judgment by Congress.

6. The Secretary promulgated revised versions of 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 in March 1985. In accordance with the text and legislative history of Section 4 of the 1984 Act, these new regulations take into account the combined effect of multiple impairments, but otherwise leave in place the step 2 requirement that the claimant demonstrate a medically severe impairment or combination of impairments that significantly limits his ability to perform basic work functions. 50 Fed. Reg. 8727-8728 (1985). The Secretary concluded in promulgating these regulations that Congress intended when it passed the 1984 Act to continue to permit the denial of a claim based solely on medical evidence that the claimant's impairment is not severe (see 50 Fed. Reg. 8726 (1985)). That manifestly is a permissible interpretation of Congress's action in 1984, and the severity regulation should have been sustained by the court of appeals on this ground alone. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 844-845. This conclusion is all the more compelled when Congress's most recent action is considered in light of the firmly established nature of the severity regulation in the administration of the disability program since 1954 and

---

[30] That, of course, was a principal basis for the court of appeals' ruling in this case (Pet. App. 5a, 9a).

the consistent pattern of support for the regulation in the legislative history of prior amendments to the Social Security Act.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court for a determination of whether there is substantial evidence to support the Secretary's decision that respondent has not established the existence of a "severe" impairment within the meaning of 20 C.F.R. 404.1520(c) and 404.1521.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

AUGUST 1986

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 223(d)(1)(A), (2)(A) and (C) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A), (2)(A) and (C), provides:

(d) "Disability" defined

(1) The term "disability" means–

(A) inability to engage in any substantial gainful acitivity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)–

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

* * * * *

(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

2. Section 1614(a)(3)(A), (B) and (G) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 1382c(a)(3)(A), (B) and (G), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

* * * * *

(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

* * * * *

3. 20 C.F.R. 404.1520 and 404.1521 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activites.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

4. 20 C.F.R. 416.920 and 416.921 provide:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled.

We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work, If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can on longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, Mar. 5, 1985]

§ 416.921 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20293

QUESTIONS PRESENTED

Whether the court of appeals properly invalidated the severity regulation, 20 C.F.R. 404.1520(c), which authorizes the Secretary to summarily deny benefits on medical evidence alone to claimants who might be able to establish that their medical impairments render them unable to do their past work, or other work, if appropriate consideration of statutorily identified vocational factors were not precluded by the regulation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

COUNTERSTATEMENT

The Secretary purports to vindicate the severity regulation as a consistent and longstanding interpretation of the Social Security Act. As Respondent sets forth below, the history of the regulation reveals that the Secretary originally implemented the Act as allowing no more than a *de minimis* threshold test for screening out meritless claims. In recodifying the "slightness standard" in 1978, however, the Secretary effected a substantive change in the threshold standard, which he enforced through binding instructions to agency adjudicators. Thus, at all times relevant to this case, the Secretary's interpretation of the Act as implemented through the severity regulation was far from consistent with his original interpretation. Rather, he construed and applied the severity regulation so as to deny meritorious disability claims, and improperly increase the claimant's burden of proof in disability determinations.

1. The statutory definition of disability, adopted for the Social Security disability program in 1954[1] is an

> inability to engage in any substantial gainful activity by reason of any medically determinable mental or physical impairment which can be expected to result in death or which has lasted or can be expected to be of long-lasting and indefinite duration . . . .

---

[1] This definition was adopted for use in the current disability benefits program in 1956. 42 U.S.C.§ 423(d)(1)(A) (1956) (amended 1965). The 1965 amendment required the impairment to be one "which has lasted or can be expected to last for a continuous period of not less than 12 months. . . ." Pub.L.No. 89-97, § 303(a), 79 Stat. 286 (amending 42 U.S.C. " 423(d)(1)(A) (1956).

42 U.S.C. § 416(i) (1954).[2]

Regulations implementing the 1954 statute made clear that the vocational factors of "education, training and work experience" were to be considered in determining "whether an individual's impairment makes him unable to engage in . . . [substantial gainful] activity." 20 C.F.R. § 404.1501(b) (1958); 22 Fed.Reg. 4362 (June 20, 1957). Subsequent revisions to the regulations reiterated that:

> Conditions which fall short of the levels of severity indicated [for automatic eligibility] must also *be evaluated in terms of whether they do in fact prevent the individual from engaging in any substantial gainful activity, taking into account his age, education, training and work experience.*

25 Fed.Reg. 8100 (Aug. 24, 1960) (emphasis added).

A claim could only be denied on medical grounds alone if the impairment was so slight that no one could be found disabled following a full evaluation. Thus the regulations promulgated in 1960 stated that:

> [M]edical considerations alone may justify a finding that the individual is now under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other similar abnormality or combination of abnormalities.

---

[2] The disability program for disabled workers is now codified in Title II of the Act, 42 U.S.C. §§ 401 *et seq.* Title XVI of the Act, 42 U.S.C. §§ 1381 *et seq.*, establishes the Supplemental Security Income Program ("SSI") for disabled persons who are financially needy. Many claimants qualify for benefits under both programs, and the relevant statutory provisions and the implementing federal regulations defining disability are identical for the two programs. Because Respondent's current claim is for Title II disability benefits only, this brief refers to the Title II statutory and regulatory provisions.

25 Fed.Reg. 8100 (Aug. 24, 1960).

2. The 1967 amendments to the Act codified the vocational considerations contained in the Secretary's contemporaneous interpretation of the 1954 Act. The amendments provided that:

> (A) an individual (except a widow, surviving divorced wife, widower or surviving divorced husband for purposes of section 420(e) or (f) of this title) shall be determined to be under disability only if his physical or mental impairment or impairments are *of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy,* regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A) (emphasis added).

The 1967 amendments also provided benefits for disabled surviving spouses. Both the Senate Report and the Conference Report emphasized that the test of disability for surviving spouses was "*more restrictive than that for disabled workers* and childhood disability beneficiaries" in that determinations "*would be based on the level of severity of the impairment . . . without regard to nonmedical factors* such as age, education, and work experience, *which are considered in disabled workers cases.*" S.Rep. No. 744, 90th Cong., 1st Sess. (1967) (emphasis added); *see also* H.Conf.Rep. No. 1030, 90th Cong., 1st Sess. (1967), reprinted in [1967] U.S. Code Cong. & Admin. News 3197-3198.

3. In 1978, the Secretary first promulgated regulations stating that a claim could be denied on the ground

that it was "not severe." 43 Fed.Reg. 9284, 9303 (March 7, 1978). In introducing this language, he stated that it was "not intended to alter the levels of severity for a finding of disabled or not disabled on the basis of medical considerations alone, or on the basis of medical and vocational considerations." *Id.* at 9297. He represented that this regulation ("the severity regulation") referred only to impairments that "have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective of his or her age, education, and work experience." *Id.* at 9296.[3]

When the 1978 regulations were published in final form, the Secretary noted in the comments section that it had been suggested "that the term [not severe] indicates a change in definition of disability, while another [commenter] believed it could be seen as a device to limit entitlement." 43 Fed.Reg. 55357 (November 28, 1978). The Secretary reiterated that the regulations were not intended to alter the levels of severity for a finding of disabled or not disabled. *Id.* at 55358. The Secretary further stated that "the burden of proof remains as established in the case law and observed by SSA [Social Security Administration]." *Id.* at 55359. Despite these assurances, the percentage of claims denied on medical grounds alone in the Title II program rose from 8.4% in 1975 to over 40% in 1979.[4]

---

[3] The severity regulation was introduced as the second of a series of questions used to evaluate disability claims called the "sequential evaluation." See *Heckler* v. *Campbell*, 461 U.S. 548, 460 (1983).

[4] Staff of House Committee on Ways and Means, 99th Cong. 2d Sess., *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, (Comm. Print 1986) at 114. The statistical evidence shows that the increase in severity denials began even before the official promulgation of the severity regulation. One court has noted that there is evidence that

4. In 1980, the Secretary renumbered and rewrote the regulations. 45 Fed.Reg. 55556 (August 20, 1980). The rewritten regulations stated that an impairment would not pass the severity threshold unless it "significantly" restricted the ability to engage in specified basic work activities. The severity regulation is now codified at 20 C.F.R. 404.1520(c).

The Appeals Council, the highest adjudicative body of the Social Security Administration (SSA) (see 20 C.F.R. § 404.981), commented on these regulations when they were first proposed. It stated that the concept of a "significant" limitation on basic work activities was inconsistent both with the Secretary's stated position that the severity regulation was not intended to change the previous regulatory concept of slightness and with the definition in the preamble to the regulation which phrased the inquiry in terms of "any" limitation.[5] The Appeals Council also

---

the severity regulation was enforced prior to its publication through internal administrative actions. *See Dixon* v. *Heckler*, 589 F.Supp. 1494, 1506-1507 (S.D.N.Y. 1984), *aff'd* 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2). In 1984, the percentage declined somewhat as a result of court orders enjoining its application in the Ninth Circuit, New York, Illinois, and other states.

[5] [T]he specific listing of physical and mental functions and the statement that an impairment is not severe unless these functions are *significantly* limited is inconsistent with the stated position of the Social Security Administration that the reference to "basic work activities" (now called "basic work-related functions") was not intended to change, but merely clarify, the previous regulatory terms "a slight neurosis, slight impairment of sight or hearing, or other slight abnormalties." Further, the current definition is also inconsistent with the definition in the preamble which states that an impairment is not severe when it "does not *in any way* limit a person's physical or mental ability to do those things needed to work." In addition, the Council has noted that there has been a vast increase in denials based on an

noted that there had been a vast increase in denials based on non-severity even though the 1978 regulations asserted that they did not change the standard for denying disability benefits.

When the 1980 regulations were published in final form, the Secretary admitted that he had effected a substantive change back in 1978:

> Although this evaluation approach to impairments that are not severe has been in the regulations for some time, *we expanded it in 1978* . . .
>
> We anticipated that greater program efficiency would be obtained by this provision *by limiting the number of cases* in which it would be necessary to follow the vocational evaluation sequence . . . .

45 Fed.Reg. 55574 (August 20, 1980) (emphasis added).

The Secretary also noted that he was studying the feasibility of revising the rules, conceding that it might be as efficient to screen claims based on ability to return to prior work. *Ibid.*

5. The Secretary implemented the 1980 regulations through two Social Security rulings (SSR's). instructing adjudicators on the proper construction of the severity regulation: Social Security Ruling 82-55, Medical Impairments That Are Not Severe (effective August 20, 1980

---

impairment allegedly being "not severe," contrary to the statement in the preamble to the present regulations that this was not expected to occur. We recommend deletion of the word "significantly."

Memorandum from Appeals Council to Office of Policy and Procedure, on "Recodification of Regulations on Determining Disability and Blindness," August 8, 1979. Reproduced in Joint Appendix lodged with this Court in *Bowen* v. *Dixon*, No. 86-2, p. 667 (emphasis in original).

(Cum.Ed. 1982), see Appendix attached hereto, 1a; and Social Security Ruling 82-56, The Sequential Evaluation Process (effective August 20, 1980 (Cum.Ed. 1982)) see Appendix, attached hereto, 6a. These rulings were binding on all adjudicative components of SSA. 20 C.F.R. § 422.408.[6]

These rulings made clear that the severity regulation represented an additional eligibility requirement rather than a continuation of the slightness screening standard introduced in 1960. SSR 82-55 provided 20 examples of impairments which were considered irrebuttably non-severe, thus shedding any pretense that an assessment would be made of the effect of an impairment on the claimant's ability to engage in substantial gainful activity. The ruling included such impairments as documented osteoarthritis, colostomies, diabetes and hypertension. Furthermore, the ruling mandated that adjudicators ignore the combined effects of two or three or more non-severe medical impairments suffered by the same individual. SSR 82-56 specified that the claimant could no longer make a prima facie showing of disability by proving he did not have the "residual functional capacity" (the actual capacity remaining despite the impairment, 20 C.F.R. § 404.1567) to perform his former work: "[A]n impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past."

6. In 1983 the Secretary undertook a study "to reexamine the 'not severe' impairment concept . . ." Final

---

[6] SSR 82-55 was "obsoleted" without replacement. SSR 85-III-II (April, 1985). SSR 82-56 was replaced in 1986 by SSR 86-8. Only SSR 82-55 and SSR 82-56 were effective at the time respondent Yuckert's case was adjudicated.

Report of Workgroup—DECISION, reproduced in Joint Appendix to *Bowen* v. *Dixon*, *supra*, at 610. This study surveys the history of the severity step, notes its inherent subjectivity, and observes the widespread difficulty in understanding or applying the step. *Id.* at 620. The study draws two conclusions: (1) despite statements made regarding the purpose of the step, "its application" after 1975 "suggests a change of position," *ibid.*; and (2) SSR 82-55 in particular "may contribute to overinclusive use" of the step, *id.* at 621. The study states that the step "has not been, and probably cannot be, clearly explained either to SSA adjudicators or to the public." *Id.* at 622. The workgroup developed options for remedying the problems with the regulation. The workgroup found two of the options to "have merit": (1) a regulatory revision returning to the prior slightness standard at step two for screening out frivolous claims; and (2) "deletion or modification of step 2 with a redefined not severe impairment concept incorporated into a revised regulation on RFC [residual functional capacity]." *Id.* at 625, 629.

The Secretary never acted on these recommendations. In the absence of any regulatory action, courts proceeded to rule on the argument presented below that the regulation, as applied, conflicts with the Act. At the circuit court level, these decisions, while differing on the appropriate remedy, have found the Secretary's construction and application of the severity regulation to contravene the mandates of the Social Security Act.

7. In November, 1985, the Secretary published SSR 85-28, an interpretive ruling which, in his brief, he appears to describe as embracing a *de minimis* standard for applying the severity regulation. Brief for the Petitioner (Pet. Br.) 13-14, 26, 48 n.29. The ruling itself, however, insists that it is simply clarifying rather than

changing the non-severe impairment policy. Pet.App. 37a. In 1986, the Secretary published SSR 86-8, replacing SSR 82-56 as the Secretary's statement on the sequential evaluation process. Neither SSR 85-28, nor SSR 86-8 was applied in Respondent's case.

8. On March 14, 1986, SSA issued an internal report on a recent agency study of the severity regulation. The study found that the state agency evaluators misapplied the regulation in nearly 40% of the cases. Associate Commissioner for Disability, Social Security Administration, "Report on the Not Severe Case Study," (March 14, 1986), lodged with this Court, in May, 1986. See Reply Brief for the Petitioner at 4.

9. The proceedings in this case began when Janet J. Yuckert filed her application for Social Security and Supplemental Security Income disability benefits on October 30, 1980. Respondent Yuckert is a former travel agent whose principal impairment is "bilateral labyrinthine dysfunction," a condition which causes dizziness and makes it difficult to focus her eyes, to read or to stand. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix (Pet.App.), 3a. She "can see only one word at a time." *Ibid.* "Her dizziness and equilibrium problems limit her ability to walk or drive: she walks cautiously, staying close to walls or counters, ..." *Ibid.* "Both of Yuckert's treating physicians concluded that she was disabled." *Ibid.*

Respondent Yuckert's application was initially denied at step four of the sequential evaluation (finding that she retained the residual function capacity to do her past work), rather than at step two, the severity step. Joint Appendix (J.A.) 19-21. She was denied again on reconsideration. *Id.* at 23-26. She appealed, and, after a hear-

ing, the Administrative Law Judge affirmed the denial of benefits, basing the decision on the severity regulation. Pet.App. 28a. The Appeals Council denied her request for review by a letter dated June 25, 1982, Pet.App. 22a, and, on August 18, 1982, Respondent Yuckert filed a timely appeal in the Western District of Washington alleging that the Administrative Law Judge's decision failed to give proper weight to the opinion of the treating physician and was not based on substantial evidence. Respondent Yuckert did not challenge the validity of the "non-severe" regulation in the district court. On October 25, 1984, the district court adopted the magistrate's recommendation and affirmed the Secretary's decision. Pet.App. 14a and 20a.

10. Respondent Yuckert appealed to the Ninth Circuit Court of Appeals on December 20, 1984 and shortly thereafter moved for remand pursuant to an order enjoining use of the severity step issued earlier that year in a circuit-wide class challenge to the severity regulation. *Smith* v. *Heckler*, 595 F.Supp. 1173 (E.D.Cal. 1984), *appeal pending*, No. 85-2178 (9th Cir., argued Oct. 10, 1985).[7] This motion was denied.

Respondent Yuckert then moved to stay proceedings pending a ruling in the Ninth Circuit in *Smith* v. *Heckler*. The Secretary did not oppose the motion for stay and even "suggest[ed] that . . . argument in [this] case be stayed."

---

[7] *Smith* v. *Heckler* was filed as a class challenge to the severity regulation in December, 1983. On June 6, 1984, a circuit-wide class was certified and the use of the severity step was preliminarily enjoined. On November 27, 1984, following complaints that the Secretary was delaying implementation of the preliminary injunction, the court issued a more detailed order elaborating procedures for reevaluating pending administrative claims and remand of claims pending before the courts.

Appellee's Response to Appellant's Motion to Stay Proceedings. However, the stay motion was also denied and the court proceeded to consider Respondent Yuckert's appeal. At this point Respondent challenged the validity of the severity regulation.

On October 24, 1985, the court of appeals reversed and remanded to the district court. *Yuckert* v. *Heckler*, 774 F.2d 1365 (9th Cir. 1985), (9th Cir. 1985), Pet.App. 1a. The Ninth Circuit's analysis of the severity regulation was informed by the facts of the individual claim before it. The Ninth Circuit reviewed the evidence of Respondent's conditions and noted that an expert witness had testified that "Yuckert was incapable of returning to her past work and that she probably could not perform any other job until her condition improved." Pet. at 3a. The court observed that under Social Security Ruling 82-56—the Secretary's own binding instruction to SSA personnel—adjudicators were required to ignore such evidence of Respondent's inability to return to her prior work in determining whether she had a severe impairment. Pet. 10a, n.8.

The court concluded that by ignoring such evidence the severity step violates the "long established" statutory allocation of the burden of proof in disability determinations and "does not permit the individualized assessment of disability required by the Act."[8] Pet.App. 8a-9a.

---

[8] The court relied on *Johnson* v. *Heckler*, 769 F.2d 1202, 1210-13 (7th Cir. 1985), *reh'g denied*, 776 F.2d 166 (1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (Mar. 11, 1986) (No. 85-1442); *Baeder* v. *Heckler*, 768 F.2d 547, 551-53 (3d Cir. 1985); *Dixon* v. *Heckler*, 589 F.Supp. 1494, 1502-06 (S.D.N.Y. 1984), 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986); *Delgado* v. *Heckler*, 772 F.2d 570, 574 (9th Cir. 1983); and referred to *Heckler* v. *Campbell*, 461 U.S 458, 467 (1983), for the "statutory scheme for individual determin ions."

Accordingly, the court held that the severity regulation violates the Social Security Act.

Subsequent to oral argument in the court of appeals but prior to issuance of the decision, the Secretary submitted a draft of a new ruling purporting to clarify or alter the "non-severe" step. In revised form, this draft ruling was eventually to become SSR 85-28, discussed *infra* at 29. The court of appeals "express[ed] no view as to the validity" of this draft ruling because it was unpublished and because it attempted to interpret a regulation which the court had invalidated. Pet.App. 9a n.6.

The court remanded Respondent Yuckert's case to the district court "with instructions that the Secretary reevaluate Yuckert's claim . . . ." Pet.App. 11a-12a. However, remand from the district court to the Secretary has been deferred at the request of the Secretary, and over Respondent's objections, pending the present proceedings.

SUMMARY OF ARGUMENT

The Social Security Act defines disability in terms of both medical and vocational considerations. Under this statutory definition, a claimant is eligible for disability benefits if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for twelve months. 42 U.S.C. § 423(d)(1)(A). The statute further provides that to determine whether an impairment is so severe that it prevents the claimant from engaging in substantial gainful activity, the impairment must be evaluated in terms of its effect on the claimant's ability to return to his past work or to perform other work the claimant is qualified for in light of his age, education and

work experience. 42 U.S.C. § 423(d)(2)(A). This statutory definition recognizes that the same impairment affects people with different vocational characteristics differently. Thus the older, the less educated, and the less training a claimant has, the more likely it is that his impairments will prevent him from engaging in substantial gainful activity, and will therefore render him eligible for disability benefits.

Three requirements derive from the statutory definition of disability. First, the Act's directive that disabling inability to work be determined by reference to a claimant's ability to do his "previous work" and then to his ability to do other work has been interpreted by all the courts of appeals to allocate the burden of proof in accordance with this mandated two-stage inquiry. While the claimant bears the ultimate burden of proving disability, he meets his prima facie burden by showing that his medical impairments prevent him from performing his past work. The Secretary then has the burden of going forward to show the claimant is able to perform other work.

Second, the Act requires an individualized determination of disability: "[A]n *individual* . . . shall be determined to be under a disability only if *his* physical or mental impairments are of such severity that *he* is not only unable to do *his* previous work but cannot, considering *his* age, education, and work experience, engage in . . . [other work]." 42 U.S.C. § 423(d)(2)(A) (emphasis added).

Third, a claimant who proves himself unable to do his previous work or other work because of his impairments is disabled under the Act; he therefore cannot be denied benefits on medical grounds alone if consideration of these relevant vocational factors might result in a finding of disability.

For a threshold screening standard to comply with the statute, it must be a *de minimis* test. Under a *de minimis* test, an individual can be denied benefits on medical evidence alone only if his impairment is so slight that it could not interfere with the individual's ability to work, irrespective of age, education and work experience. A *de minimis* standard thus incorporates an implicit consideration of the relevant vocational factors by asking whether any set of vocational factors, when considered with a claimant's impairment(s), might prevent him from working. Similarly, a *de minimis* test respects the Act's requirement of individualized determinations by ensuring that an individualized evaluation of vocational factors will not be precluded at later stages of evaluation if they might affect the ultimate determination of disability. Finally, a *de minimis* standard respects the allocation of the burdens of proof by ensuring that any claimant who proves an inability to do past work due to his reduced functional ability (and thus meets his *prima facie* burden of proof) will not be denied benefits on medical evidence alone.

The severity regulation formally adopted by the Secretary in 1978 does not describe a *de minimis* threshold standard; it authorizes a stricter one. It defines a nonsevere, and thus disqualifying, impairment as one that does not "significantly limit" a claimant's ability to perform "basic work activities." It expressly prohibits any consideration of age, education and work experience at all—even the type of implicit vocational consideration that the *de minimis* test contemplates. It substitutes a judgment regarding the ability to do basic work activities for an evaluation of the claimant's actual residual capacity to do his prior work. It thus creates an overbroad presumption of non-disability based on an unspecified degree of functional loss in reference to the performance of an abstract concept of work.

To counter the conflict between the statutory definition of disability and the severity regulation, the Secretary claims he has sought to apply the regulation consistently with a *de minimis* standard. Virtually every court of appeals has concluded that the Secretary has applied the severity regulation to impose upon claimants a stricter than *de minimis* step two test. The Secretary's contrary claim is belied by the Social Security rulings which he used to implement the regulation, the internal studies of the implementation of the regulation, as well as the statistics documenting the dramatic rise in the percentage of claims denied at step two.

The Secretary also argues that the regulation should be upheld no matter how strict a standard it actually imposes and regardless of whether it is inconsistent with the burden of proof law. In addition, he misrepresents what the court of appeals held, and undertakes a question-begging examination of the legislative history.

To defend a stricter than *de minimis* test, the Secretary disfigures the Act by bifurcating the statutory definition. His argument cannot survive even a cursory glance at the statute. The first words in § 423(d)(2)(A) are, "[f]or purposes of paragraph (1)(A)—. . . ." The two subsections form a unitary statutory definition: section (d)(2)(A) structures the inquiry in determining whether a claimant is "unable to engage in any substantial gainful activity" within the meaning of section (d)(1)(A).

As the court of appeals correctly noted, the Act requires the Secretary to consider "both medical and vocational factors" in making the ultimate determination of disability. Contrary to the Secretary's assertions, nothing in the court's decision bars implementation of a *de minimis* threshold standard. The court invalidated the

Secretary's severity regulation because it resulted in denials of benefits to claimants based on medical factors alone, even where consideration of vocational factors could have dictated a different result.

The Secretary's opposition to the invalidation of the regulation by the court below is really a challenge to the remedy which the court chose to apply. The circuits are divided over the remedial question of whether to judicially impose a narrow construction on the severity regulation in an attempt to create a *de minimis* test or to invalidate the regulation, thereby leaving the Secretary free to promulgate new regulations consistent with the statutory mandate. However, Respondent Yuckert's interest in the present case is in having her claim adjudicated under a *de minimis* standard. Either remedy, invalidation of the regulation or imposition of a narrowing construction, is intended to ensure that claims are subjected to no more than a *de minimis* standard. Respondent Yuckert would be entitled to the remand afforded her by the court of appeals even if this Court were to decide the remedy chosen by the court below was improper. It is Respondent's position, however, that invalidation of the regulation is not only a permissible remedy, but, in fact, the most effective remedy in light of the Secretary's steadfast refusal to construe the severity regulation in a *de minimis* fashion despite the chorus of appellate decisions directing him to do so.

ARGUMENT

The Secretary has mischaracterized the court of appeals' decision, the decisions of other circuits, and his own record of implementing the regulation invalidated below in order to characterize this appeal as concerning the legitimacy of a *de minimis* regulation for screening

out meritless claims for disability benefits. In seeking reversal of the Ninth Circuit's judgment, the Secretary asks this Court to ratify a regulation which the courts of appeals have found to be in conflict with the mandates of the Social Security Act.[9] Each of these courts has interpreted the requirements of the Act in the same way—as authorizing a *de minimis* threshold severity step, but not a stricter one that imposes higher burdens on claimants. Each of these courts has ruled that a legitimate *de minimis* step must comport with the rule that a claimant meets his *prima facie* burden of proof by showing an impairment rendering him unable to return to his past work. Each of these courts has ruled that a *de minimis*

---

[9] The appellate courts are divided only with respect to the corresponding remedial question. Five circuits, including the Ninth Circuit, have remedied the conflict between the regulation and the Social Security Act by invalidating the regulation. *Wilson* v. *Secretary of Health and Human Services*, 796 F.2d 36 (3rd Cir. 1986), and *Baeder* v. *Heckler*, 768 F.2d 547 (3rd Cir. 1985); *Johnson* v. *Heckler*, 769 F.2d 1202 (7th Cir. 1985), *reh'g. denied*, 776 F.2d 166 (1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (Mar. 11, 1986) (No. 85-1442); *Brown* v. *Heckler*, 786 F.2d 870 (8th Cir. 1986); *Hansen* v. *Heckler*, 783 F.2d 170 (10th Cir. 1986). *See also Dixon* v. *Heckler*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2) (affirming preliminary injunction enjoining the regulation).

Four circuits have remedied the conflict between the severity step policy and the Social Security Act by attempting to impose a narrow construction on the Secretary's use of the regulation: *Evans* v. *Heckler*, 734 F.2d 1012 (4th Cir. 1984); *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985); and *Estran* v. *Heckler*, 745 F.2d 640 (5th Cir. 1984); *Farris* v. *Secretary of Health and Human Services*, 773 F.2d 85 (6th Cir. 1985); and *Salmi* v. *Secretary of Health and Human Services*, 774 F.2d 685 (6th Cir. 1985); *McCruter* v. *Bowen*, 791 F.2d 1544 (11th Cir. 1986); and *Brady* v. *Heckler*, 724 F.2d 914 (11th Cir. 1984). *See also McDonald* v. *Heckler*, 795 F.2d 1118 (1st Cir. 1986) (imposing a narrowing interpretation on the Secretary's recent "clarification" of the severity standard, SSR 85-28).

severity step only screens out groundless claims. Each of these courts has concluded that the Secretary has not, at any time relevant to this case, applied the severity regulation as a *de minimis* standard.

Rather than address this authority, the Secretary adopts the strategy of embracing the appellate rulings which were decided adversely to him and creating a fictional conflict between those decisions and that of the court below. The Secretary consistently characterizes the Ninth Circuit as having prohibited him from enforcing any threshold severity test (*including* a *de minimis* test) under which benefits can "be denied on the basis of medical evidence alone," *i.e.*, without specific consideration of the claimant's age, education or work experience. Pet.Br. 13, 21, 25. The problem for the Secretary in pursuing this argument is that the court below did not disapprove a *de minimis* threshold when it struck down the existing, stricter severity test.

While maintaining that he has always implemented a *de minimis* severity step, the Secretary also defends the statutory legitimacy of a stricter standard. This argument not only conflicts with the Secretary's own description of his practices, but also finds no support in the statute, its legislative history, or the accepted rules on burden of proof in disability cases.

I. THE SEVERITY REGULATION AND THE STEP TWO THRESHOLD SCREENING TEST THAT THE SECRETARY APPLIED PURSUANT TO THAT REGULATION, VIOLATE THE SOCIAL SECURITY ACT

A. The Statutory Definition Of Disability Requires That A Claimant's Impairments Be Evaluated In Terms Of Their Effect On His Actual Ability To Work.

1. The act defines disability and structures the inquiry in disability determinations in 42 U.S.C.

§§ 423(d)(1)(A) and (d)(2)(A). To be found disabled, an individual must prove an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). The next provision structures the inquiry governing the determination of whether a claimant does, in fact, have such an "inability to engage" in work: the severity of any medically determinable impairment is measured by reference to its effect on the individual's ability to perform his past work, or, in light of his age, education and work exerience, other work.

> *For purposes of paragraph (1)(A)—*
>
> . . . an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .

42 U.S.C. § 423(d)(2)(A) (emphasis added).

While the Act requires a claimant to have a medically determinable impairment, the determination of whether a claimant has an "inability" to work "by reason of" that impairment depends upon whether the impairment imposes limitations on the claimant such that he is "not only unable to do his previous work but cannot, considering his age, education, and work experience engage in [other work]." 42 U.S.C. §§ 423(d)(1)(A), (2)(A). The Act, in short, requires that the determination of a disability claim involve not only an abstract medical assessment, but a medical-vocational one as well: that is, it demands an assessment of how a claimant's medical impairments affect his actual ability to work. This Court has accord-

ingly recognized that the Act, "defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace." *Heckler* v. *Campbell*, 461 U.S. 458, 460 (983); *see also*, *Bowen* v. *City of New York*, 106 S.Ct. 2022, 2025 (1986).[10] It is this latter medical-vocational inquiry which implements the Act's recognition that loss of function in the legs is a more severe impairment for an uneducated 60-year-old construction worker than for a 40-year-old attorney.

Three interrelated directives derive from the statutory mandate that a claimant's "disability" be evaluated in terms of how his impairments affect his actual ability to work. First, the Act's directive that disabling inability to work be determined by reference to a claimant's ability to do his "previous work" and then other work has been interpreted by all the courts of appeals to allocate the burden of proof in a two-stage inquiry.[11] In this two-stage

[10] The Secretary argues that the statutory definition of disability permits the Secretary to deny benefits to a claimant, even when a vocational assessment—a determination of the effect his impairments have on his actual ability to work—might show him to be disabled. Pet.Br. at 13-14, 25-6. But Congress knew how to define disabling severity without reference to vocational factors (*i.e.*, age, education, and work experience) when it wished to do so. *Compare*, 42 U.S.C. § 423(d)(2)(B) (defining "disability" for widow(er)s and surviving divorced spouses in terms giving Secretary authority to deny benefits on medical factors alone) *with* 42 U.S.C. § 423(d)(2)(A) (defining disability with reference to vocational as well as medical factors). *See*, 20 C.F.R. § 404.1577 (1985); *Hansen* v. *Heckler*, 783 F.2d 170, 172 (10th Cir. 1986).

[11] *Meneses* v. *Secretary of Health, Education and Welfare*, 442 F.2d 803 (D.C.Cir. 1971); *Hernandez* v. *Weinberger*, 493 F.2d 1120, 1123 (1st Cir. 1974); *Bastien* v. *Califano*, 572 F.2d 908, 912-13 (2d Cir. 1978); *Choratch* v. *Finch*, 438 F.2d 342 (3d Cir. 1971); *Smith* v. *Califano*, 592 F.2d 1235, 1236-37 (4th Cir. 1979); *Lewis* v. *Weinberger*, 515 F.2d 584, 587 (5th Cir. 1975); *O'Banner* v. *Secretary of Health, Education and Welfare*, 587 F.2d 321, 323 (6th Cir. 1978); *Stark* v. *Weinberger*, 497 F.2d 1092, 1097-98 (7th Cir. 1974); *Garrett* v. *Richardson*, 471 F.2d 598, 603-04 (8th Cir. 1972); *Hall* v. *Secretary of Health, Education and Welfare*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Channel* v. *Heckler*, 747 F.2d 577, 579 (10th Cir. 1984); *Francis* v. *Heckler*, 749 F.2d 1562, 1564 (11th Cir. 1985).

inquiry, the claimant meets his prima facie burden of proof by showing that his medical impairments prevent him from performing his past work. Once that showing is made the Secretary has the burden of going forward to show the claimant is able to perform other work that exists in the national economy. If the Secretary makes such a showing, the burden shifts back to the claimant, to rebut the Secretary's evidence and meet his ultimate burden of proving disability.

Second, the Secretary cannot determine the effect of a claimant's medical impairments on his actual ability to work, without scrutinizing the claimant himself. The Act accordingly requires individualized determinations of disability: "[a]n *individual* . . . shall be determined to be under a disability only if *his* physical or mental impairments are of such severity that *he* is not only unable to do *his* previous work, but cannot, considering *his* age, education, and work experience, engage in [other work]." 42 U.S.C. § 423(d)(2)(A) (emphasis added). See *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983) ("statutory scheme contemplates that disability hearings will be individualized determinations").

Third, given that a claimant is disabled if he proves himself unable to do (1) his "previous work" and (2) considering his "age, education and work experience" any other work as well, a claimant cannot be denied benefits on

medical grounds alone if consideration of these relevant vocational factors might result in a finding of disability.

2. The severity regulation sets forth a screening standard that all claimants must meet to have their claims for benefits fully evaluated, i.e., evaluated by reference to their ability to do their past work and (if they are unable to do such work) other work, "considering their age, education, and work experience." 42 U.S.C. § 423(d)(2)(A). There is nothing wrong with the idea of such a screening test, but in order to conform with the statutory dictates discussed above, any screening test imposed must be no stricter than the "*de minimis* test" approved by all the courts of appeals which have addressed this issue. *See supra*, at 17. Under a *de minimis* test, an individual can be denied benefits on medical evidence alone only if his impairment is so slight that it could not interfere with his ability to work, irrespective of age, education and work experience.

A *de minimis* test respects the Act's mandates regarding the consideration of vocational factors, individualized assessments, and the burdens of proof. A *de minimis* test satisfies the Act's requirement that impairment severity be determined by reference to ability to do prior work and, considering the claimant's age, education and work experience, other work because it does not "screen out" (*i.e.*, deny claims) when one or more of those factors might affect the disability determination at a later step of the sequential evaluation. A *de minimis* step thus incorporates an implicit consideration of the relevant vocational factors, by asking whether *any* set of vocational factors, when considered with claimant's impairment, *might* prevent him from working. Similarly, a *de minimis* test respects the Act's requirement of individualized determinations: while it does not itself involve an individualized consideration of a claimant's specific age, education and work experience at step two, it ensures that an individualized evaluation of vocational factors will not be precluded at steps four and five if they might affect the ultimate determination of disability. Finally a *de minimis* test respects the Act's allocation of the burdens of proof because it ensures that any claimant who proves an inability to do his past work (and thus meeets his prima facie burden of proof) will not be denied benefits at step two.

For the same reasons that a *de minimis* step two test conforms with the Act, any test imposing a higher threshold burden on claimants does not. Any test that denies a claimant benefits at step two, when the claimant has impairments that impose functional limitations severe enough that he might be able to prove disability if his vocational factors were individually considered at step five of the sequential evaluation, violates the Act. Similarly, a test that denies a claim at step two, when the claimant has met or might meet his statutory prima facie burden of proof, violates the Act. In sum, any threshold severity test that imposes an eligibility standard which precludes the consideration of evidence deemed relevant by the Act, when that evidence might affect the determination of disability, violates the Act.

3. The severity regulation does not describe a *de minimis* threshold standard; it authorizes a stricter one. The severity regulation defines a non-severe, and thus disqualifying, impairment as one that does not "significantly limit" a claimant's ability to perform "basic work activities." When the regulation was first promulgated, the Appeals Council recognized that this definition would deny benefits to eligible claimants. *See supra*, at 5. Although "significantly limited" is not defined, the Secre-

tary lists examples of basic work activities, 20 C.F.R. § 404.1521(b), and calls them "the abilities and aptitudes necessary to do most jobs."[12] *Id.*, at § 404.1521(a). The regulation expressly prohibits any consideration of age, education and work experience at all—even the type of implicit consideration that the *de minimis* test contemplates. As the Secretary emphasizes, a claimant is denied benefits at step two on the basis of medical evidence alone. Pet.Br. 16-17.

By its terms, the severity regulation substitutes a judgment regarding the ability to do basic work activities for an evaluation of the claimant's actual capacity to do his prior work. But an inability to do "basic work activities" cannot be consistently equated with an inability to do one's prior work—the statutory *prima facie* burden of proof standard. The fact that a claimant's "abilities and aptitudes necessary to do most jobs" are not "significantly limited" does not establish that he is still able to do his past work or, considering his age, education and work experience, other work. "Step two . . . permits the Secretary to label a claimant as not disabled, even though his impairments *in fact* prevent him from doing his past work." *Johnson* v. *Heckler*, 769 F.2d at 1202, 1211 (emphasis in original). Respondent Yuckert, for example, was denied benefits at step two notwithstanding her presenta-

[12] The Secretary relies on this aspect of the severity regulation to urge that it implicates "vocationally-related considerations." Pet.Br. 22. But this assertion is contradicted by his insistence that "the principle reflected in the regulation. . . . [is] that a person may be denied disability benefits on the basis of medical evidence alone. . . ." (*See, e.g.*, Pet.Br. 16-17.) Moreover, describing basic work activities as "vocational" does not turn them into the individual claimant's past work, age, education and work experience, the vocational factors identified in the Act.

tion of evidence of her inability to do her previous work: that showing should have been sufficient to require a determination of whether she actually was unable to do her past work and if so, whether there was other work she was competent to do in light of her vocational factors.[13] Under the Secretary's sequential evaluation procedures, the fourth step directly asks whether the claimant can perform his past work, i.e., meet his prima facie burden. To operate consistently with the Act's allocation of the burdens, steps one through three cannot impose a test that exceeds the claimant's prima facie burden.

In sum, the severity regulation that the Secretary adopted, unlike a *de minimis* step two test, denied benefits to claimants who might have been able to prove their eligibility at a later stage of the sequential evaluation. It created an overbroad presumption of non-disability based on an unspecified degree of functional loss in reference to the performance of an abstract concept of work. This

[13] Petitioner quotes the ALJ's and magistrate's findings that Respondent Yuckert's struggle to learn new skills and to reenter the work force are evidence that she is not disabled. Pet.Br. 5-6. This focus on Respondent's rehabilitation efforts as evidence of ability to engage in substantial gainful activity is misplaced. The Social Security disability program not only encourages but often requires efforts at vocational rehabilitation. 20 C.F.R. § 416.212. Congressional concern for providing vocational rehabilitation for disabled workers was expressed in the earliest discussions of the disability program. *See* S.Rep.No. 1669, 81st Cong., 2d Sess. at 3, reprinted in [1950] U.S. Code Cong. & Ad. News 3287, 3289. In some instances, disability benefits will continue during a course of rehabilitation even though the actual disability has ceased. *Paskel* v. *Heckler*, 768 F.2d 540, 546 (3d Cir. 1985), citing *Leschniok* v. *Heckler*, 713 F.2d 520 (9th Cir. 1983). Even attendance at a law school has been found not to preclude a finding of disability. *Detamore* v. *Schweiker*, 569 F.Supp. 288, 290 (E.D.Pa. 1983).

precluded the type of practical, individualized assessment the Act requires, see *Campbell*, 461 U.S. at 467, and relieved the Secretary of his responsibility to meet his burden of going forward, even when a claimant may have met his prima facie burden of showing an inability to do his past work.

4. The Secretary has consistently applied the severity regulation to impose upon claimants a stricter than *de minimis* step two test. His assertion that the severity regulation was implemented as a *de minimis* standard to screen out relatively minor impairments, Pet.Br. 10, 13, 14, 26, 27, has no support in the record here, or elsewhere. The appellate courts have concluded that the Secretary applied the severity regulation in a stricter than *de minimis* way. *See supra*, at 17. There is no contrary appellate authority. The Secretary's claim is also contradicted by his own Social Security rulings and internal studies of the implementation of the regulation, as well as the dramatic rise in the percentage of claims denied on medical evidence alone. *See supra*, at 4, 7-9.

The relevant rulings establishing the policies defining step two are SSR 82-55 and SSR 82-56. *See supra*, at 7-8. In SSR 82-55, the Secretary listed twenty impairments illustrative of mental and physical impairments that were to be considered per se non-severe under step two regardless of the claimant's actual ability to work. SSR 82-56 stated that the non-severe test permits denials of benefits "*even though* . . . [the impairment] may prevent the individual from doing work that the individual has done in the past." The Secretary denied benefits to claimants with impairments on the SSR 82-55 list (or any other impairments *thought to be* of comparable severity), regardless of whether the impairments prevented claimants from doing their past work. *Id.* The Secretary's

severity regulation thus clearly violated the Act's allocation of the burden of proof.

The Secretary's assertion that he has construed the severity regulation as a *de minimis* standard is also belied by his own arguments in defense of the statutory legitimacy of a stricter than *de minimis* test, and by his defense of a stricter than *de minimis* application of the severity regulation itself. Thus, in *Salmi* v. *Heckler*, 774 F.2d 685, 690 (6th Cir. 1985), the Secretary argued that the severity requirement ". . . [i]mposes more than a *de minimis* threshold requirement . . ." and that, ". . . [a]t least implicitly, Congress did not intend a standard as lenient as *Brady*." *See also Williamson* v. *Secretary of Health and Human Services*, 796 F.2d 146, 150 (6th Cir. 1986) (rejecting the Secretary's argument that "when the evaluation terminates at step two on a finding of no severe impairment, it does not matter whether the claimant satisfies the criteria in the Listing of Impairments [per se disabling impairments]."). Consistently, the Secretary has defended non-severe denials where the medical evidence has unambiguously described impairments of "serious proportions." *Mowery* v. *Heckler*, 771 F.2d 966 (6th Cir. 1985); *Martin* v. *Heckler*, 748 F.2d 1027 (5th Cir. 1984); *Glover* v. *Heckler*, 588 F.Supp. 956 (S.D.N.Y. 1984); *Evans* v. *Heckler*, 734 F.2d 1012 (4th Cir. 1984).[14]

5. The Secretary's defense of a stricter than *de minimis* test rests on his bifurcating the statutory definition.

---

[14] These cases cannot be considered aberrations, or misapplications by administrative law judges. The Secretary defended these denials as proper applications of the severity regulation. Petitioner has incorrectly cited the *Evans* case to support the proposition that the Fourth Circuit "has sustained decisions of the Secretary *denying* benefits based on a finding that the claimant's impairment was not severe. . . ." Pet.Br. 18 n.9 (emphasis added).

Pet.Br. 13, 25-6. He describes § 423(d)(1)(A) as a provision that requires a claimant to make a threshold showing of substantial medical severity. Only if such a showing is made, he argues, does the Act allow the claimant to proceed to make the showing § 423(d)(2)(A) requires. His alternative presentation of this statutory formulation is that § 423(d)(2)(A) does not impose any prerequisites to a *denial* of benefits at the threshold step, such as consideration of past work, age, education and work experience; rather, it only poses additional burdens on the claimant. Pet.Br. 25.

The Secretary's argument cannot survive even a quick glimpse at the statute. The first words in § 423(d)(2)(A) are, "[f]or purposes of Paragraph (1)(A)—. . . ." The two subsections form a unitary statutory definition: section (d)(2)(A) is to be implemented in determining whether or not a claimant is "unable to engage in any substantial gainful activity," within the meaning of section (d)(1)(A). By its terms, it does not set forth requirements that become relevant only after a (d)(1)(A) determination is made.

The Secretary seeks to disparage—in a footnote—the well-established statutory allocation of the burden of proof, which the court of appeals relied upon in finding the severity regulation inconsistent with the Act. Pet.Br. 28-9 n.15; Pet.App. 10a-11a. His argument is, however, contradicted not only by the decisions of twelve courts of appeals, *see supra*, at 17, but also by the Secretary's own previously expressed understanding when he promulgated the sequential evaluation regulations. 43 Fed.Reg. 55359 (1978) ("The burden of proof remains as established in case law . . . .").[15] Further, Congress agrees that the

[15] The reference was to the line of cases beginning with *Meneses* v. *Secretary of Health, Education and Welfare*, 442 F.2d 803 (D.C.Cir. 1971). *Meneses* itself rejected the analysis the Secretary summarily offers in his brief, based on the 1967 amendments; and every other circuit has followed suit.

case law sets forth the formulation it intended. "[When a claimant shows an inability to do his past work, then] [a]t this stage, because of a judicial opinion and subsequent administrative and legislative ratification, the burden of proof switches to the Government . . . ." Staff of House Comm. on Ways and Means, 99th Cong., 2d Sess., Background Material on Programs Within the Jurisdiction of the Committee on Ways and Means, at 113 (Comm. Print 1986).

6. To counter the conflict between the statutory definition of disability and the severity regulation, the Secretary characterizes SSR 85-28 as setting forth a lawful *de minimis* standard, Pet.Br. 13-14, 26, 48, and implicitly urges this Court to consider the validity of the regulation in light of the ruling.[16] The Court should decline to do so for three reasons: (1) the ruling was issued in violation of the Disability Benefits Reform Act of 1984; (2) an examination of the ruling would require this Court to examine an ambiguous ruling which has not been interpreted by the lower courts; and (3) an interpretive ruling cannot effectively resolve the conflict between the severity regulation and the Act.

SSR 85-28 was issued in violation of the Secretary's obligation under the Disability Benefits Reform Act. See 42 U.S.C. § 421(k)(1)(2). Under this provision, the Secretary is required to establish by regulation subject to the rule-making procedures established under the Administrative Procedures Act (APA), 5 U.S.C. § 553 ". . . uni-

[16] Should this Court find that SSR 85-28 is potentially relevant to these proceedings, even though it did not exist at any time during the adjudication of Respondent Yuckert's claim, this case should then be remanded. See *Thorpe* v. *Housing Authority of Durham*, 386 U.S. 670, 673 and n.4 (1967) (vacating and remanding a challenge to public housing eviction procedures in light of an intervening agency circular which potentially affected the challenged procedures).

form standards which shall be applied in determining whether individuals are under disabilities defined in . . . 423(d) of this title." The legislative history of the provision indicates that "changes in policies that affect whether or not people receive disability benefits . . . [should] be published in the regulations allowing for public participation in the process." H.Rep. No. 618, 98th Cong., 2d Sess. 21, *reprinted in* [1984] U.S. Code Cong. & Ad. News 3058. See *Bowen* v. *City of New York*, 106 S.Ct. 2022 (1986) (describing consequences of making policy changes through secret instructions to staff). The Secretary uses the ambiguity of SSR 85-28 to make inconsistent arguments. If SSR 85-28 was intended to reform the severity step in response to judicial criticism, SSR 85-28, Pet.App. 40a, then it must be published pursuant to the Administrative Procedures Act.[17] On the other hand, if SSR 85-28 is merely a clarification of existing policy, Pet.Br. 10; Pet.App. 37a, it cannot be viewed as remedial.

This Court should decline to examine the contents of SSR 85-28 inasmuch as it contains factual issues that have not been passed on by the lower courts. *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). The ruling contains no clear substantive standard.[18] It also makes no attempt to rec-

---

[17] The public comment and resulting administrative scrutiny that the APA procedures afford might have cured some of the ambiguities that the appellate courts have identified in SSR 85-28. See *Hansen*, 783 F.2d at 175.

[18] SSR 85-28 is sufficiently contradictory to support the conflicting propositions that the ruling is only a clarification (implying that the severity step needs no reform), Pet.Br. at 10, and also that it reflects the orders of those courts which "have taken issue with the Secretary's previously stated definition of "not severe impairment" (implying that the ruling reforms the severity step), Pet.App., 40a. *See also*

oncile the Secretary's step two regulation with the well-established burden of proof rules. *See supra*, at 20. As a result, it is impossible to determine how the ruling would actually be applied. Only through discovery and an evidentiary hearing or on a record in a case in which the Secretary's ruling has been applied, could these questions be resolved.

7. Contrary to the Secretary's assertions, nothing in the court of appeals' decision bars implementation of a *de minimis* threshold standard. The Secretary's contrasting reading of the ruling is erroneous.

Pet.Br., 10.

On the one hand, the introduction and closing language of the ruling suggest the Secretary intends to adopt a *de minimis* standard and includes encouraging language on the limited applicability of the severity step. The ruling even misquotes a statement made in *Baeder* v. *Heckler*, 768 F.2d at 553 where the court found that the "severity regulation does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which would never prevent a person from working." (The Secretary's use of *Baeder* as a clarification of the severity policy is less than candid. SSR 85-28 suggests that *Baeder* stands for the proposition that the regulation "is to do no more than allow the Secretary to deny benefits summarily. . . ." SSR 85-28, Pet.App. 40a. The reliance on *Baeder* is ". . . entirely out of context," *Wilson* v. *Heckler*, 622 F.Supp 649, 654 (D.N.J. 1985), *aff'd.*, 796 F.2d 36 (3d Cir. 1986).

The actual standard set out in the heart of the ruling, however, does not screen out only those claimants whose impairments could "never" affect their ability to work. Instead, it restates the old approach of establishing an overbroad presumption that screens out all impairments which would have a "minimal" impact on the ability to do "most jobs." SSR 85-28, Pet.App. 41a. This same approach led to the development of lists of *per se* non-severe impairments (*see supra*, at 7-8), and is evidence of the "Secretary's intent to pay mere lip service to the *de minimis* standard." *Hansen* v. *Heckler*, 783 F.2d at 176 (10th Cir. 1986), *citing Stone*, 752 F.2d at 1103, 1106 (5th Cir. 1985).

The Secretary reads the court of appeals ruling to "require the decision maker to consider the vocational factors of age, education and work experience" at step two of the sequential evaluation process and to prohibit him from employing any threshold "severity step" at all. Pet.Br. 13, 22, 25. Neither understanding is correct.

As the court of appeals correctly noted, the Act requires the Secretary to consider "both medical and vocational factors" in disability determinations. Pet.App. 9a. It invalidated the Secretary's severity regulation because it authorized denials of benefits to claimants based on medical evidence alone, even where consideration of vocatonal factors could have dictated a different result. *Ibid.*

B. The Legislative History Of The Social Security Act And Its Amendments Demonstrates That Congress Endorsed Nothing More Than A *De Minimis* Severity Step.

1. Contrary to the Secretary's contentions, the legislative history of the Act shows that Congress intended that disability determinations be based on a consideration of medical and vocational factors and that any congressional support for a threshold medical test was premised on the assumption that the test would be *de minimis* and would not screen out claimants who would otherwise be found disabled if vocational characteristics were considered.

2. The 1954 definition of disability required that impairments be evaluated in terms of their effect on the claimants' ability to engage in substantial gainful activity. *See supra*, at 2. Furthermore, as the Secretary acknowledges, his own contemporaneous regulations implementing this statutory definition required an inquiry into the individual's education, training and work experience."

Pet.Br. 38, n.22 (*quoting* 22 Fed.Reg. 4362 (June 20, 1957)). Similarly, subsequent revisions to the regulations, prior to adoption of the severity regulation, only authorized a *de minimis* threshold test to screen out claimants with slight impairments. Thus, in now arguing that the 1954 statute authorized a threshold medical test that would deny benefits to persons who would otherwise be found disabled, the Secretary faces the heavy burden of showing that his contemporaneous interpretations misperceived congressional intent. He does not meet that burden. *See Salmi* v. *Secretary of Health and Human Services*, 774 F.2d at 690 (Secretary's litigation position on the meaning of the 1954 conference report conflicts with his own previous interpretations).

The Secretary places substantial reliance on language from the 1954 congressional reports, stating that a claimant must be "totally" disabled. Pet. Br. 30, 31. He suggests that by excluding persons who were "partially disabled" Congress meant to preclude consideration of vocational factors in determining disability. There is no indication that Congress, or SSA, understood the term "total disability" to preclude consideration of vocational factors. On the contrary, the agency's directives implementing the first federal-state disability program, the Aid to the Totally and Permanently Disabled (ATPD), clarify the agency's interpretation of the terms.[19] The

---

[19] House Report No. 1189, 84th Cong., 1st Sess. (1955), discusses congressional reliance on the agency's implemetation of the ATPD program in enacting the first program for the payment of disability benefits, based on the 1954 definition of disability. "We have now had 4½ years of experience with the special category of aid to the permanently and totally disabled. . . . The adoption, in 1950, of the assistance program to provide for the income maintenance needs of the disabled clearly expressed the intention of the Congress that the

Social Security Administration's Bureau of Public Assistance offered the following definitions to states to guide disability determinations:

> In general, "permanently and totally disabled" means that the individual has some permanent physical or mental impairment, disease or loss that substantially precludes him from engaging in useful occupations within his competence, such as holding a job or homemaking. . .
>
> * * *
>
> The term "permanently" refers to a physiological, anatomical or emotional impairment verifiable by medical findings . . . "permanence" does not rule out the possibility of vocational rehabilitation or even recovery from the impairment.
>
> * * *
>
> "Totally" involves considerations in addition to those verified through the medical findings, such as age, training, skills and work experience, and the probable functioning of the individual in his particular situation in light of his impairment. . . . In many cases no decision as to total disability can be made without such social data as will describe the individual's education and work history, the activities required of him in his home or in his job, living and working conditions, interests, native capacities and the extent to which he has adjusted to the loss he has sustained. . . .

Social Security Administration State Letter No. 174 § 3420 (April 16, 1952).

Furthermore, sections of the legislative history upon which the Secretary relies are quoted out of context. The

disabled should not be allowed to go without the necessities of life. It also indicated the judgment of the Congress that it was administratively feasible to determine who is disabled. . ." *Id.* at 4.

Secretary quotes the Senate Finance Committee Report, Pet.Br. 31, 32, which acknowledges that "[s]tandards for evaluating the severity of disabling conditions will be worked out in consultation with the state agencies." But petitioner omits the subsequent (which is the final) sentence, which clearly reflects the congressional intention that the severity of impairments will be evaluated in terms of a claimant's ability to perform in actual work settings:

> [the standards] will reflect the requirement that the individual be disabled not only for his usual work but also for any type of substantial gainful activity.

S.Rep. No. 1987, 83rd Cong., 2d Sess., 21 (1954).

See also Baeder v. *Heckler*, 768 F.2d at 551, ("Both the statute and the legislative history speak in terms of medical *and* vocational factors and emphasize the importance of the relation between the two," citing *inter alia* Senate Report No. 1987, *supra*).[20]

[20] Petitioner also relies on the Disability Freeze State Manual, an administrative document issued in 1955 to instruct the states in making disability determinations under the 1954 Act. Pet.Br. 34, n.20. To the extent that this manual has any bearing on congressional intent, it supports the court of appeals' conclusion that the statute requires a realistic evaluation of ability to work in light of medical and vocational considerations. The manual describes the importance of considering "age, education, training, experience, and other individual factors . . ." in any case where a realistic evaluation cannot be made on the basis of the medical factors plus cessation of work. See § 324B. The manual instructs that, "[i]n evaluating the effect of an impairment, it should be considered that the impairment may be more limiting for an older than for a younger man," noting that the aging process "makes itself felt with respect to healing, prognosis, physiological degeneration, psychological adaptability and, in consequence, on vocational capacity." § 325B. The section concludes that "the impact of the aging process upon the specific individual will have

3. The Secretary also relies on post-enactment hearings which were held in 1959 to review the disability program. Again, these hearings show that Congress was assured that disability determinations would be made on a realistic basis in light of medical and vocational considerations. In these hearings, Robert Ball, then Deputy Director of the Bureau of Old Age and Survivor's Insurance, assured Congress that the agency would not deny benefits to a person with a medically determinable impairment based on the individual's not meeting listed medical conditions. Mr. Ball stated:

> [W]e will make the presumption that if his disability is that severe [as is stated in the guides] that the fact he is not working is because of or by reason of that medically determinable physical or mental impairment. *The presumption does not work the other way around, though.* We will make the presumption that he is disabled for working if he meets the level of severity in the guides and there are no facts to the contrary but we may pay him even though his disability does not reach this level of severity.

Administration of Social Security Disability Insurance Program, Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess., at 28-29 (1959) (emphasis added).

Mr. Ball's exchange with Rep. Harrison revealed the identical interpretation of the statutory definition which

---

to be considered in connection with the particular impairment claimed to prevent substantial gainful activity." *Ibid.* The manual also recognizes that "education and training are factors in determining the employment capacity of an applicant." § 326. The manual's listing of per se disabling conditions does not override its clear requirement that a realistic evaluation be made of a claimant's inability to work.

is explicit in the Medical-Vocational guidelines today, *i.e.*, that the statutory definition requires a realistic evaluation of inability to engage in substantial gainful activity, which necessitates a consideration of a person's age, education and experience:

> Mr. Harrison. A woodchopper with a third grade education might get so he can't chop wood. He is a lot worse off then Mr. Herlong would be if he got so he couldn't chop wood. Isn't that right?
>
> Mr. Ball. That is right.

Id. at 69.

Thus the administrative interpretation of the statutory standard brought to Congress' attention reveals an emphasis on realistic evaluations of a claimant's capacity to work in light of medical and vocational considerations. The agency's early interpretation of the statute included a *de minimis* screening standard. Congress had no reason to regard it as more, in light of the testimony given by the agency's director, as well as its chief medical officer,[21] and the agency's regulations which required consideration of

---

[21] The testimony of Dr. William Roemmich, Chief Medical Officer to the Division of Disability Operations, Pet.Br. 37, n.21, also supports a *de minimis* screening standard. Dr. Roemmich interprets the severity concept inherent in the basic statutory definiton:

> "Under the law, severity must be established in terms of the applicant's remaining capacity to work. Once remaining capacity to engage in physical or mental activity has been determined, such capacity must be equated with the physical or mental activity demands of the jobs which the applicant is equipped to do by virtue of personal and vocational aptitudes."

Administration of Social Security Disability Insurance Program, Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess., at 341 (1959).

vocational factors unless the only impairment was slight. 25 Fed.Reg. 8100 (Aug. 24, 1960).

4. Petitioner offers two inconsistent interpretations of the 1967 amendments and their legislative history. Recognizing that the 1967 amendments did not prompt the Secretary to revise his regulations, petitioner argues that Congress ratified his pre-existing regulations. Pet.Br. 39. He proceeds, however, to rely on the legislative history of the 1967 amendments to show that Congress intended to impose more than the *de minimis* threshold test set forth in the Secretary's pre-existing regulations. Pet.Br. 40.[22] Read in context, the legislative history of the 1967 amendments shows that Congress was concerned with sorting out which factors should be considered in disability determinations.[23] While rejecting some considerations—such as the inability to find a job due to cyclical economic factors—Congress expressly incorporated into the statutory definition of disability the four vocational considerations that had been part of the disability determination process since 1954: age, education, work experience, and ability to return to prior work. In doing so, Congress ratified the established case law on the burden of proof in determining disability. Nowhere did Congress show any intent to abandon the requirement that medically determinable impairments be evaluated in light of age, education, work experience and ability to return to past work. *See Stone* v. *Heckler*, 752 F.2d at 1105; *Dixon* v. *Heckler*, 589 F.Supp. at 1504-05.

[22] The Secretary bases his reading of the 1967 amendments on a limited excerpt from the legislative history that simply states that an impairment must be severe, without stating whether severity must be analyzed by viewing medical and vocational considerations in combination. One court observed, "the passage relied upon by the Secretary is somewhat ambiguous; it can be read simply as an explanation of the overall circumstances under which a finding of disability or non-disability will be made, rather than as a fixed sequence of screening steps under which a "severity" test is somehow a condition precedent to any consideration of the claimant's ability to engage in his prior work or of the other vocational factors." *Dixon* v. *Heckler*, 589 F.Supp. at 1505. The *Stone* court also rejected the Secretary's analysis of the 1967 amendments; the Secretary there carried his unfounded argument to its logical conclusion, namely, that the Secretary was not required to find a claimant disabled, even if the claimant proved his impairment prevented him from doing his prior work or in light of his age, education and experience, any other work. *Stone* v. *Heckler*, 752 F.2d at 1105. *See also Baeder* v. *Heckler*, 768 F.2d at 551. Congress simply did not write the statute in the way the Secretary would ask this Court to read it.

Congressional intent to retain a medical-vocational analysis for disabled workers is further reflected in contemporaneous amendments regarding eligibility for disabled widows. Although Congress provided that disabled widows must meet a prescribed test of medical severity, Congress specifically declined to amend the basic definition of disability for workers. *See supra*, at 3, 20, n.10.

[23] Congress was concerned with judicial interpretations of the Social Security Act which looked to a very narrow geographic area in determining whether an individual could perform substantial gainful activity or which considered whether a vacancy was available for the claimant. *See, e.g., Tigner* v. *Gardner*, 356 F.2d 647 (5th Cir. 1966); *Wimmer* v. *Celebrezze*, 355 F.2d 289 (4th Cir. 1966); *Reagie* v. *Gardner*, 261 F.Supp. 184 (D.Mont. 1966). The 1967 amendments specifically addressed this case law by providing that the evaluation of substantial gainful activity should be made without regard to whether "such work exists in the immediate area in which [the claimant] lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 423(d)(2)(A).

5. Finally, the Secretary argues that the Disability Benefits Reform Act of 1984 "effectively ratified" the severity regulation. Pet.Br. 44. Once again, the Secretary's argument begs the question of what kind of threshold test Congress approved. The legislative history of the 1984 Act conclusively shows that Congress was concerned with remedying the Secretary's improper refusal to consider the combined effect of multiple impairments, not with ratifying the severity regulation.[24] Furthermore, the legislative history sanctions nothing more than a *de minimis* test for screening out groundless claims. Indeed, every circuit court, including the court below, which has considered the Secretary's arguments regarding the 1984 Act has rejected the Secretary's suggestion that the Act approved more than a *de minimis* threshold test. *See e.g., Yuckert* v. *Heckler,* Pet.App. 9a-10a; *Johnson* v. *Heckler,* 769 F.2d at 1213-1214; *Hansen* v. *Heckler,* 783 F.2d at 174; *McDonald* v. *Heckler,* 795 F.2d at 1126-1127.

Section 4(a)(1) of the 1984 Amendments, Pub.L. 98-460, 98 Stat. 1794, remedied the Secretary's prior refusal to consider the combined effects of impairments. Under this amendment:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

[24] This Court has recently recognized that "[t]he Reform Act is remedial legislation, enacted principally to be of assistance to large numbers of persons whose disability benefits have been terminated." *Bowen* v. *City of New York,* 106 S.Ct. 2022-2033, n.14. *See also Johnson* v. *Heckler,* 769 F.2d at 1212 (rejecting the Secretary's construction of the 1984 legislative history).

This amendment made no change in the 1954 definition of disability other than to require the Secretary to consider the combined effect of all of an individual's impairments on his ability to work.

The Conference Report on the 1984 amendments to the Social Security Act explained the "present law" on multiple impairments:

> There is no statutory provision concerning the consideration of the combined effects of a number of different impairments. The definition of disability requires a finding of a medically determinable impairment *of sufficient severity to prevent the person from doing not only his previous work but also any other kind of work that exists in the national economy, considering his age, education and work experience.* By regulation, the combined effects of unrelated impairments are considered only if all are severe (and expected to last 12 months).

Joint Explanatory Statement of the Committee of Conference, H.Rep. No. 98-1039, 98th Cong., 2d Sess., *reprinted in* [1984] U.S. Code Cong. & Ad. News 3087 (emphasis added).

The Conference Report described the purpose of the multiple impairment provision which was enacted into law as follows:

> The conferees believe that this policy [of not considering the combined effect of multiple "non-severe" impairments] may preclude realistic assessment of

> those cases involving individuals who have several impairments which in combination may be disabling. The conference agreement provides, therefore, that *in determining whether an individual's impairment or impairments are so severe as to prevent him from engaging in substantial gainful activity,* consideration must be given to the combined effect of all the individual's impairments without regard to whether any single impairment considered separately would limit the individual's ability.

Id. at 3088 (emphasis added).

The Conference Committee's explanation of the purpose of the multiple impairment provision is consistent with the plain language of the provision itself. The Committee's use of the phrase "so severe as to prevent him from engaging in substantial gainful activity" in this paragraph follows the basic statutory definition of disability, which defines the eligibility standard as an inability to engage in substantial gainful activity by reason of any medically determinable impairment.

Furthermore, the Conference Committee's statement on the sequential evaluation process requires that the Secretary not apply a severity standard that exceeds a *de minimis* test.

> [A] determination that an individual is not disabled may be based on a judgment that an individual has *no impairment*, or that the medical severity of his impairment or combination of impairments is *slight* enough to warrant a *presumption*, even without a *full* evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current 'sequential evaluation process' allows such a determination and the conferees do not intend to either eliminate or impair the use of that process. The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for

> non-severe impairments and expect that the Secretary will report to the Committee on the results of this evaluation.

Id. at 3088 (emphasis added).

In adopting this language, the Conference Committee rejected the Senate Report's statement that the severity regulation could be applied to deny claims "on a strictly medical basis, and without regard to vocational factors."[25] In contrast, the screening standard articulated by the Conference Committee states that a finding of *no* impairment, or a *slight* impairment will not warrant a *full* evaluation of vocational factors. The phrase "without a full evaluation of vocational factors" suggests that the standard for evaluating slight impairments will be guided by an implicit, or limited vocational analysis. Thus, Congress would permit a *de minimis* regulation such as that promulgated in 1957 and publicly endorsed by the Secretary in 1978.

It is the congressionally sanctioned *de minimis* standard which the courts have imposed on the Secretary to restrain his illegal construction and implementation of the severity regulation. (*See supra*, at 17.) That standard, however, was not applied during the adjudication of Respondent's case.

---

[25] Petitioner also relies on the partisan, post-conference statement of Senator Russell Long in order to demonstrate that Congress had a different understanding of the severity regulation. Pet.Br. 44. Senator Long's comments, howver, reiterated the views of the Senate Finance Committee which were rejected in conference. Therefore, they are not a reliable guide to congressional intent. *Chrysler Corp* v. *Brown*, 441 U.S. 181, 211 (1979).

II. INVALIDATION OF THE SEVERITY REGULATION IS AN APPROPRIATE REMEDY TO RESOLVE THE CONFLICT BETWEEN THE SOCIAL SECURITY ACT AND THE ILLEGAL SCREENING STANDARD AUTHORIZED BY THE SEVERITY REGULATION

The Secretary's opposition to the court of appeals' invalidation of the severity regulation relies on decisions which the Secretary claims upheld the severity regulation "[as a] valid administrative implementation of the statutory standard of disability." Pet.Br. 17-18. Reliance on these cases is wholly misplaced. These cases actually condemn the Secretary's application of the severity regulation as imposing a stricter threshold standard than the Act authorizes. *See supra*, at 17. Rather than invalidate the regulation, however, these courts attempted to bring the regulation into conformity with the Act by insisting on a narrowing (*de minimis*) construction of the regulation. In one case, the court required the Secretary to make explicit reference to the court's interpretation of the regulation. *See Stone* v. *Heckler*, 752 F.2d at 1106.

The only relevant distinction between the cases on which Secretary relies and those which invalidated the severity regulation is their choice of solutions to the problem of "how best to remedy the Secretary's apparent continuing intent to apply the step two severity regulation in a manner that conflicts with the Act and the controlling case law." *Hansen* v. *Heckler*, 783 F.2d at 176; *see also Brown* v. *Heckler*, 786 F.2d at 871-3.[26] To affirm the decision of the court below, this Court need only find that the remedy that the court of appeals chose was within its authority, *i.e.*, a reasonable remedy under all the circumstances. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). In fact, the purpose of both remedies is the same in terms of the intended relief for plaintiffs. Under either remedy, Ms. Yuckert is entitled to a remand for reevaluation of her claim without reference to a stricter than *de minimis* screening standard.

[26] If this Court accepted review on the assumption that the question the Secretary presented implicated a conflict among the courts of appeals over the interpretation of the Act, that assumption was erroneous. Under similar circumstances, this Court has dismissed the writ of certiorari as improvidently granted. See *Smith* v. *Butler*, 366 U.S. 161 (1961); *Layne & Bowler Corp.* v. *Western Well Workers*, 261 U.S. 387, 392-393 (1923).

While imposing a narrowing construction would have been within the court's authority, invalidation was more likely to be an effective remedy in light of the Secretary's steadfast refusal to construe the severity regulation in a *de minimis* fashion despite the chorus of appellate decisions directing him to do so.[27] *See Hansen* v. *Heckler*, 783

[27] In *Dixon* v. *Heckler* 589 F.Supp. 1494, 1509 (S.D.N.Y.) *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2), the court prelimnarily enjoined the severity regulation, rejecting the alternative narrowing construction approach as "likely to result only in continued confusion and endless appeals of decisions in which the Secretary's findings of non-severity are reversed for failure to follow the court's construction of the regulation." That court's doubts respecting the efficiency of the narrowing construction remedy were later borne out in the Fifth Circuit. *See Stone*, 752 F.2d at 1105 (noting the Secretary's continued refusal to follow the *de minimis* standard, notwithstanding three previous Fifth Circuit decisions adopting it).

Even though invalidation might reasonably be thought to be the more effective remedy, it is less restrictive in that it leaves the Secretary free not only to enforce a *de minimis* step two, but to omit step two entirely. It is the latter option that the Secretary has in fact chosen in many jurisdictions in which the severity regulaton has been invalidated. Furthermore, the Secretary himself has suggested that a prior work threshold screening step may be an equally or more efficient one than the second (non-severe) step at issue in this litigation. See *Chico* v. *Schweiker*, 710 F.2d 947, 952-953, n.6 (2d Cir. 1983).

F.2d at 176 (referring to Secretary's "history of disregarding those controlling court rulings with which she disagrees.") *See also Brown* v. *Heckler*, 786 F.2d at 872. Because the court of appeals properly ruled that the severity regulation exceeded the *de minimis* test permitted by the Act, and therefore "exceed[ed the] Secretary's statutory authority," it acted well within its authority to invalidate the regulation.[28] Its decision should therefore be affirmed.

Should the Court decide that invalidation of the regulation was an impermissible means of ensuring that claimants would not be subjected to a stricter than *de minimis* threshold standard, then this Court should be guided by the appellate courts that have adopted the alternative remedy of imposing a narrowing construction on the regulation. Inasmuch as both remedies were designed to

---

[28] *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983). While some deference to the construction of a statute by the administrative agency charged with its implementation is appropriate, there is a limit to this deference where there are compelling indications that the agency's interpretation is wrong. *See, e.g., Securities Industry Association* v. *Board of Governors*, 104 S.Ct. 2979 (1984); *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103 (1978); *Espinoza* v. *Farrah Manufacturing Company*, 414 U.S. 86 (1973); *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973). As recently restated, "Judicial deference to an agency's interpretation of a statute only sets the framework for judicial analysis; it does not replace it," and "a reviewing court must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Securities Industry Association* v. *Board of Governors*, 104 S.Ct., at 2983, quoting prior cases. Moreover, the Secretary's inconsistent formulation and interpretation is not deserving of the deference normally accorded agency interpretation. *See General Electric Company* v. *Gilbert*, 429 U.S. 125, 140-142 (1976).

prevent the Secretary from applying a stricter than *de minimis* screening standard, Respondent Yuckert would be entitled to relief similar to that granted by the court of appeals even if this Court were to instruct the court below to adopt the alternative remedy.[29]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

CAROLE F. GROSSMAN
JAMES A. DOUGLAS
PETER KOMLOS-HROBSKY
GILL DEFORD
EILEEN P. SWEENEY
Attorneys for Respondent

October, 1986

---

[29] If this Court does decide that imposing a narrowing construction on the regulation is the appropriate remedy, it should still not reach the question of whether SSR 85-28 or any similar ruling constitutes such a narrowing construction. See *supra*, at 30. The impact of SSR 85-28 on the severity step cannot be determined without further factual development. SSR 85-28 can be viewed as articulating a *de minimis* standard only if it is read to respect the burden of proof law (a "finding of not severe is inappropriate if the claimant is unable to do his . . . past work") and applied so as to deny benefits summarily his only to claimants whose impairments are so minimal that they could never prevent anyone from working. *McDonald* v. *Heckler*, *supra*, 795 F.2d at 1125.

APPENDIX

(Previously Published as PPS-84) **SSR 82-55**

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To enunciate the policy regarding nonsevere impairments and to provide examples of impairments that are not severe in order to more clearly illustrate the level of severity required before the concept of "nonsevere impairment" can be applied in the sequential evaluation of disability.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520 and 404.1521; and Regulations No. 16, sections 416.920 and 416.921.

PERTINENT HISTORY: Regulations No. 4, section 404.1502(a), published in 1960, introduced the principle that a denial determination may be made on the basis of medical considerations alone. It stated that:

> ". . . medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities."

Sections 404.1504 and 416.904 of the regulations published in 1978 revised the 1960 statement and included a statement on work-related functions as follows:

> ". . . medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe. A medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

The meaning of work-related functions was explained in 1980 by sections 404.1521 and 416.921 of the regulations which now provide:

(a) "Nonsevere impairment. An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

(b) "Basic work activities. When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs . . ."

Examples of basic work functions are included in sections 404.1521(b) and 416.921(b).

Examples of basic work functions are included in sections 404.1521(b) and 416.921(b).

Throughout this period of regulatory revision, we have tried to identify medical conditions which demonstrate nonsevere impairments. Based on increasing experience and extensive consultation with disability program physicians, 20 examples of medical conditions that are not severe have now been recognized. These 20 examples are intended to illustrate a level of impairment severity where the evaluation principle for nonsevere impairments applies. In addition, these 20 examples, while not exhaustive, represent a significant number of specific impairments that serve as guidelines on the level of impairment severity which would warrant a finding that an individual's impairment is not severe.

POLICY STATEMENT: In determining whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, residual functional capacity (RFC), and vocational factors (age, education and work experience) are considered in that order.

Built into this process is the statutory requirement that to be found disabled, an individual must have a severe medically determinable impairment. For an impairment to be considered severe, it must significantly limit the individual's physical or mental capacity to perform one or more basic work-related functions such as standing, walking, lifting, handling, seeing, hearing, speaking, and understanding and following simple

instructions. An impairment that does not significantly limit the capacity to perform work-related functions, as they are required in most jobs, is not severe.

At that stage in the sequential evaluation process, when we may decide that an impairment is not severe, we do not consider the effects of age, education, and work experience (i.e., the vocational factors) since in such cases the determination is based on medical considerations alone. Similarly, the individual's RFC is not assessed in cases in which the individual's impairment is determined to be not severe. In such cases, the RFC assessment is not relevant because it is based upon functional limitations which result from a severe impairment, and, thus, it only comes into play at a later stage in the sequential evaluation process.

If an individual had a highly selective job involving unusual work-related functions, a nonsevere impairment may prevent him or her from performing his or her previous work. However, when an individual has a "nonsevere" impairment, no serious question of inability to engage in substantial gainful activity is present because the individual would clearly be able to perform the basic work-related functions as they are required in most jobs. The inability to perform prior work in such an instance would arise from *both* the specific demands of the work and the impairment rather than the impairment itself.

If the individual's impairment is shown by the medical evidence to be not severe in accordance with the criteria and examples described herein, that impairment cannot itself prevent performance of work-related functions, except as they may be required in a highly selective group of jobs. To be found disabled, an individual must have a severe medically determinable impairment. That standard cannot be satisfied by any impairment(s) that is compatible with the ability to perform basic work-related functions as required in most of the numerous jobs in the national economy.

Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a

combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered in assessing RFC.

The following examples are merely representative of the types of impairments which would be considered not severe and are not intended to be all inclusive. In formulating these examples, the potential for severe and prolonged pain has been considered. These conditions are not expected to produce symptoms of severe and prolonged pain.

1. Musculosketal
   a. Osteoarthriitis corrobated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints, and minimal abnormal findings on physical examination.
   b. Traumatic fracture of a vertebral body, in the absence of metabolic bone disease, with loss of less than 50 percent of height of the vertebra without significant physical findings or neurologic abnormalities.
   c. Excision of lumbar disc has been performed and there are no ongoing significant motor abnormalities or significant objective abnormal physical findings.
2. Special Senses
   a. Retention of best corrected visual acuity of 20/40 in the better eye (phakic) without significant restriction of visual fields.
   b. Retention of visual field in better eye of a radius of 45 degrees or better (visual field efficiency or approximately 70 percent).
3. Respiratory
   a. Obstructive airway disease where FEV_1 or MVV is greater than values shown in the table below, and there is no clinical evidence of impairment of gas exchange.

Height* (Inches)	FEV_1 (L/Min., BTPS)	MVV (MBC) (L/Min., BTPS)
60 or less	1.4	56
61-63	1.5	60
64-65	1.6	64
66-67	1.7	78
68-69	1.8	72
70-71	1.9	76
72 or more	2.0	80

*Height without shoes.

   b. Diffuse pulmonary fibrosis where the arterial blood gas values do not meet the requirements of Listing 3.04, table III, at an exercise level of 25 ml.0_2/kg/min., or work equivalent.
4. Cardiovascular
   a. Hypertension without significant organ damage, current or past.
   b. History of chest pain without specific ischemic findings on ECG (rest and exercise), less than 50 percent narrowing on angiography, and without significant cardiomegaly.
   c. Surgery has been performed for peripheral arterial disease and there are palpable pulses below the femoral level and no intermittent claudication.
5. Digestive
   a. Colostomy, uncomplicated, with proper function of the stoma and nutrition adequately maintained.
   b. Peptic ulcer, uncomplicated or with recovery from complications.
   c. Chronic liver disease, in the absence of ascites, with total bilirubin less than 1.5 mg. per decilter and serum albumin is 3.5 gm. per deciliter or greater.
   d. Inflammatory bowel disease (regional enteritis, ulcerative colitis) in clinical remission for 12 months prior to adjudication.

6. Genito-Urinary

   a. Nephrotic syndrome, in remission, with persistent mild edema in which urinary protein excretion is less than 500 mg. per 24 hours and serum albumin of 3.5 gm. per deciliter or greater.

   b. Chronic renal disease (other than nephrotic syndrome) in which the serum creatinine is persistently less than 3 mg. per deciliter (100 ml.), in the absence of clinical complications.

7. Endocrine

   a. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis.

8. Neurological

   a. Epilepsy with no major motor seizures for 12 months prior to adjudication.

   b. Peripheral neuropathy or neuritis, due to any cause, with no significant motor or sensory loss.

9. Mental Disorders

   a. IQ of 80 or greater in all major areas of intellectual functioning.

EFFECTIVE DATE: The policy explained herein was effective on August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566).

CROSS-REFERENCE: Program Operations Manual System, section 2107.

(Previously Published as PPS-81) **SSR 82-56**

TITLES II AND XVI: THE SEQUENTIAL EVALUATION PROCESS

PURPOSE: To state the policy regarding sequential evaluation of disability as set forth in the regulations and to explain and clarify the provisions so there is a better understanding of this policy which will result in the correct and consistent application of these provisions of the regulations.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a) of the Social Security Act, as amended; Regulations No. 4, Subpart P, sections 404.1510, 404.1520, 404.1521, 404.1525, 404.1526, 404.1528, 404.1545, 404.1560-404.1572, 404.1577, 404.1578 and Appendix 1; Regulations No. 16, Subpart I, sections 416.910, 416.920, 416.921, 416.925, 416.926, 416.928, 416.945, and 416.960-416.972.

INTRODUCTION: In determining whether an individual (except for a title II widow, widower, or surviving divorced spouse; or a title XVI child under age 18 or "statutorily blind" individual) is disabled, the regulations state that a sequential evaluation process is followed whereby current work activity, severity and duration of the impairment(s), ability to do past work and vocational factors are considered in that order. (To be found disabled, title II widows, widowers, or surviving divorced spouses and title XVI children under age 18 must meet or equal the Listing of Impairments in Appendix 1, Subpart P of the Regulations.) (See SSR 82-53 (PPS-74: Basic Disability Evaluation Guides).) This policy statement explains sequential evaluation by going through each step of the process. Where appropriate, cross-references are made to: (1) other PPS's which cover, in greater detail, specific steps in the process; or (2) pertinent regulatory provisions which are self-explanatory and not repeated here.

POLICY STATEMENT: If a title II or title XVI claimant is not working or his or her work does not demonstrate the ability

to engage in any substantial gainful activity (SGA) during the period in which disability is alleged, we give primary consideration to the severity of the individual's impairment(s). In addition, if medical considerations alone are not determinative of the issue of disability for a title II worker or childhood disability claimant or for a title XVI claimant age 18 or older, we consider the ability to do past relevant work and the individual's age, education, training and work experience, as they relate to the ability to perform any other work.

The following evaluation steps are followed in the sequence shown, *but when a determination or decision that an individual is or is not disabled can be made at any step, evaluation under a subsequent step is not necessary.*

Is The Individual Engaging In Substantial Gainful Activity?

When an individual is actually engaging in SGA or did so during any pertinent period, and there is no possibility of establishing a period of disability which ended prior to the date of the decision, a finding shall be made without consideration of either medical or vocational factors that the individual is not under a disability. When a title II or title XVI claimant is not (or was not) actually engaging in SGA, primary consideration is given to the severity of the individual's impairment(s). (See SSR 81-7 (PPS-55: Substantial Gainful Activity Earnings Guidelines After 1977) and SSR 81-39 (PPS-60: Determination of Substantial Gainful Activity of Employees, etc.) which further explain some of the basic concepts.)

Does The Individual Have A Severe Impairment?

A finding of ability to engage in SGA may be justified on the basis of medical considerations alone when the degree of a medically determinable impairment is found to be not severe. A not severe impairment may consist of *one or more* separate conditions that do not significantly limit the individual's physical or mental capacity to perform basic work-related functions.

Performance of basic work-related functions involves a capacity for sitting, standing, walking, lifting, pushing, pulling, handling, seeing, hearing, communicating, and understanding and following simple instructions. When there is no significant limitation in the ability to perform these types of basic work-related functions, an impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past. Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered. (See SSR 82-55 (PPS-84: Medical Impairments That Are Not Severe).)

Does The Individual Have An Impairment(s) Which Meets Or Equals The Listing?

A finding of disability will ordinarily be justified when the individual's impairment is one which is as severe as the impairments contained in the Listing of Impairments. The Listing of Impairments (see Regulations No. 4, Subpart P, Appendix 1) contains over 100 medical conditions which would ordinarily prevent an individual from engaging in any gainful activity. The Listing helps to asssure that determinations or decisions of disability have a sound medical basis, that claimants receive equal treatment throughout the country, and that the majority of persons who are disabled can be readily identified.

The level of severity described in the Listing is such that an individual who is not engaging in SGA and has an impairment or the equivalent of an impairment described therein is generally considered unable to work by reason of the medical impairment alone. Thus, when such an individual's impairment or combination of impairments meets or equals the level of severity described in the Listing, and also meets the duration

requirement, disability will be found on the basis of the medical facts alone in the absence of evidence to the contrary (e.g., the actual performance of SGA, or failure to follow prescribed treatment without a justifiable reason). *The claimant's impairment(s) must meet or equal a listed impairment for a favorable determination or decision to be based on medical considerations alone.*

Evaluating Medical Equivalence—Medical Judgment Required

For an impairment to be found to be equivalent in severity to a listed impairment, the set of symptoms, signs and laboratory findings in the medical evidence supporting a claim must be compared with and found to be equivalent in terms of medical severity and duration to the set of symptoms, signs and laboratory findings specified for a listed impairment. When the individual's impairment is not listed, the set for the most closely analogous listed impairment is used.

Where an individual has a combination of impairments, none of which meets or equals a listed impairment, and each impairment is manifested by a set of symptoms and relevant signs and/or abnormal laboratory findings, the collective medical findings of the combined impairments must be matched to the specific set of symptoms, signs, and laboratory findings of the listed impairment to which they can be most closely related. The mere accumulation of a number of impairments will not establish medical equivalency. In no case are symptoms alone a sufficient basis for establishing the presence of a physical or mental impairment.

Any decision as to whether an individual's impairment or impairments are medically the equivalent of a listed impairment must be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including consideration of a medical judgment about medical equivalence furnished by one or more physicians designated by the Secretary. The Disability Determination Services physician's documented medical judgment as to equivalency meets this regulatory requirement.

Interrelationship Of Medical And Vocational Factors: Title II Worker Or Childhood Disability Beneficiary/Title XVI Claimant Age 18 or Older

When a determination cannot be made on the basis of the medical factors alone (i.e., when the impairment falls short of the level of severity depicted by the Listing, yet there is a significant limitation in the ability to perform basic work-related functions), the sequential evaluation process must continue with consideration of the vocational factors in the claim. *A finding of ability to engage in any SGA cannot be justified solely on the grounds that the impairment does not meet or equal the level of severity depicted by the Listings.*

Evaluation under Regulations No. 4, section 404.1520(e) and (f) and Regulations No. 16, section 416.920(e) and (f) requires careful consideration of whether the individual can do past relevant work (PRW), and if not, whether he or she can reasonably be expected to make a vocational adjdustment to other work. When the individual's residual functional capacity (RFC) precludes meeting the physical and mental demands of PRW, consideration of all the facts of the case will lead to a finding that (1) the individual has the functional and vocational capacity for other work, considering the individual's age, education, and work experience, and that jobs which the individual could perform exist in significant numbers in the national economy, or (2) the extent of work that he or she can do, functionally and vocationally, is too narrow to sustain a finding of ability to engage in SGA.

Since the severity of the impairment must be the primary basis for a finding of disability, this step of the evaluation process begins with an assessment of the claimant's functional limitations and capacities. Then a determination or decision must be made as to whether the individual retains capacity to perform past relevant work. An evaluation is then made of age, education, work experience and training. Consideration of the following principles will help identify the key issues for resolution

with respect to these factors. No single factor should be considered as conclusive. They should be applied in combination to the range of work that remains within the claimant's RFC.

Whether the claimant retains the functional capacity to perform work which he or she has done in the past has far-reaching implications and should be developed and explained fully in the disability determination or decision. Neither the determination or decision nor the denial notice should concede inability to do past work unless there is adequate documentation to establish the fact. Since this is an important and, in some instances, a controlling issue, every effort should be made to secure evidence that resolves the issue clearly and explicitly.

The vocational factors as well as RFC are described in detail as follows:

- *RFC*—RFC is the remaining ability to perform work-related physical and mental activities. The claimaint's functional capacity must be defined in terms of the claimant's ability to function in a work setting. When multiple impairments are involved, the assessment of RFC reflects the restrictions resulting from all impairments (both severe and not severe impairments). This assessment is based on all relevant evidence pertaining to RFC consistent with appropriate clinical and laboratory findings.

  Assessment of physical capabilities (e.g., strength and exertional capabilities) includes an evaluation of the individual and indicates his or her maximum RFC for sustained activity on a regular basis. Such assessment also includes an evaluation of the ability to perform significant physical functions such as walking, standing, lifting, carrying, pushing, or pulling;, and such other physical traits and sensory characteristics as reaching, handling, seeing, hearing, and speaking insofar as limited capacity to perform these activities may affect the individual's capacity for work for which he or she would otherwise be qualified.

  Any medically determinable impairment(s) not resulting in exertional limitations (such as certain mental, sensory or skin impairments) must be considered in terms of the limitations resulting from the impairment. When an individual

- has such impairment(s) in addition to an exertional impairment(s), remaining functional capacity must be assessed in terms of the degree of any additional narrowing of the individual's work-related capabilities. The assessment of impairments because of mental disorders includes consideration of such factors as the ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and customary work pressures in a routine work setting.

  The RFC assessment is based primarily on the medical findings, i.e., the symptoms, signs, and laboratory results, which must be complete enough to permit and support the necessary judgements concerning the individual's physical, mental, and sensory capacities and any environmental restrictions. Descriptions and observations of the claimant's restrictions by medical and nonmedical sources in addition to those made during formal medical examinations must also be considered in the determination of RFC.

  Where no issue with respect to specific physical or mental capacities is raised by the allegations of the individual or the evidence obtained, the individual is considered to have no restrictions with respect to those capacities. The individual has the burden of proving that he or she is disabled and of raising any issue bearing on that determination or decision.

  For the purpose of determining the exertional requirements of work in the national economy, jobs are classified as "sedentary," "light," "medium," "heavy," and "very heavy." Such terms have the same meanings as are used in the *Dictionary of Occupational Titles*, published by the Department of Labor (DOL), and when used in making disability determinations or decisions are used as follows: sedentary work, light work, medium work, heavy work, and very heavy work. In order to evaluate the claimant's skills and to help determine the existence in the national economy of work the claimant is able to do, occupations are classified as unskilled, semiskilled, and skilled. For classifying these occupations, materials published in the DOL are used.

- *Age*—The term "age" refers to chronological age and the extent to which it affects the individual's ability to adapt to

a new work situation and engage in work in competition with others. Reference sources and materials dealing with chronological age in terms of vocational impact point to a direct relationship between age and the ability to adjust to other work.

These sources and materials reflect employment problems developing at age 45 and the problems becoming significantly intensified at age 55. Thus, the regulations reflect age 55 and over as "advanced age," representing the point when age could be expected to be an adverse consideration in determining an individual's vocational adaptability to work differing from that of his or her past experience. However, disability is *never* determined on the basis of age alone. The following age classifications are established in Regulations Nos. 4 and 16 (see sections 404.1563 and 416.963): younger person, person approaching advanced age and person of advanced age. These designations of age are an expectancy only, not arbitrary limits, and may not be crucial in a particular case. Age categories are not applied mechanically in borderline cases.

- *Education and Training*—Education generally refers to formal schooling; training refers to skills and knowledge acquired on the job or through general experience in an industry or field of work. Both can significantly affect ability to work, and must therefore be considered in evaluating the impact of an impairment on an individual claimant. (Regulations Nos. 4 and 16, sections 404.1564 and 416.964, establish the following classifications of educational levels; illiteracy, marginal education, limited education, high school and above, and inability to communicate in English.)

Training that is vocationally significant prepares an individual to do a specific job or provides background to do a number of jobs in the same field. Training that is not reflected in the individual's actual work experience would raise questions as to its adequacy and current usefulness to the individual. Content, duration, and recency should be considered in determining the scope and application of training and its current usefulness. Normally, if an individual completed training more than 15 years prior to the point at which the claim is being considered for adjudication (or when the earnings requirement was last met if earlier) and did not make use of it in his or her work, it would not affect

over, even if completed within the 15-year period, training would not ordinarily be expected to qualify an individual for more than entry level (e.g., at the apprenticeship or lowest beginning level) occupations. Therefore, care should be exercised to assure that undue weight is not attributed to training and to ascertain how training can be utilized in occupations.

- *Experience*—The jobs a person has done, the length of time spent at them, and the recency of the work are major factors in determining his or her ability to work. Work experience is relevant when it was performed within the pertinent 15-year period, lasted long enough for the individual to learn the job, and consisted of SGA. Work experience must be examined in the light of available knowledge of the physical and skill demands of different kinds of work in order to evaluate the effect of the impairment on the person's ability to return to past relevant work or to utilize remaining capacities in other jobs. (For a more detailed discussion of prior work experience, see SSR 82-62 (PPS-80: A Disability Claimant's Capacity to do Past Relevant Work).)

The RFC assessment is used to determine whether an individual can perform past relevant work or considering an individual's age, education and work experience, other work which exists in the national economy.

- *Capacity to Do Past Relevant Work*—The RFC to meet the physical and mental demands of jobs a claimant has performed in the past (either the specific job as a claimant performed or the same type of work as it is customarily performed throughout the economy) is generally a sufficient basis for a finding that the individual is not disabled. Past work experience should be considered carefully to assure that the available facts support conclusions regarding the claimant's ability or inability to perform this work.

  Where an individual with a marginal education and long work experience of 35 years or more limited to the performance of arduous unskilled physical labor is not working, and is no longer able to perform such labor because of a severe impairment(s), such an individual will generally be found to be disabled. (See Regulations Nos 4 and 16, sec-

found disabled if he or she has a severe impairment of any nature, is of advanced age, has a limited education, and has no relevant work experience.

If the individual is able to meet the physical and mental demands of past relevant work, he or she should be found not disabled. However, the inability to do past relevant work is not in itself a basis for a finding of disability.

- *Capacity to Do Other Work*—If an individual cannot perform any past relevant work because of a severe impairment(s), but the remaining physical and mental capacities are consistent with meeting the physical and mental demands of a significant number of jobs (in one or more occupations) in the national economy, and the individual has the vocational capabilities (considering age, education, and past work experience) to make an adjustment to work different from that performed in the past, it shall be determined that the individual is not disabled.

  However, if an individual's physical and mental capacities in conjunction with his or her vocational capabilities (considering age, education and past work experience) do not permit the individual to adjust to work different from that performed in the past, it shall be determined that the individual is disabled.

The assessment ability to engage in SGA involves the evaluation of such factors as the functional capacity to perform the physical or mental exertion of work and to sustain work at a level which meets the standards of SGA on a regular and continuing basis. In all such cases where a determination or decision regarding disability is to be made, the evidence must be sufficient to permit a comparison between the claimant's capabilities and limitations and the requirements of relevant occupations.

The regulations require that, at this point in the sequential evaluation process, the rules established in Appendix 2 to

Subpart P of Regulations No. 4 must be used to direct or to guide the determination as to whether the individual is "disabled." Where all factors relative to an individual coincide with those in a rule in the Appendix, that rule directs a conclusion as to whether the individual is "disabled," When all factors do not coincide with a rule (e.g., the individual has the RFC for more than light work but for less than the full range of medium work), the rules are used as a frame of reference for determining whether the individual is "disabled."

Similarly, when an individual has a combination of exertional and nonexertional impairments, the rules are used as a frame of reference for determining "disability." The exertional impairment is considered first under the applicable rule, and then the additional restriction(s) imposed by the nonexertional impairment is considered.

When an individual has a solely nonexertional impairment, the principles established in the regulations are applied in determining "disability," giving consideration to the rules for specific case situations described in Appendix 2 (i.e., use of the rules as a frame of reference). When the nonexertional impairment is a mental impairment, the ability to concentrate, to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and pressures in a work setting are considered. (See Regulations Nos. 4 and 16, sections 404.1545(c) and 416.945(c).)

The Disability Determination Or Decision

The disability determination or hearing decision must be set forth carefully. The rationale must reflect the sequential evaluation process; describe the weight attributed to the pertinent medical, nonmedical and vocational factors in the case; and reconcile any significant inconsistencies. Reasonable inferences may be drawn, but presumptions, speculations and suppositions should not be substituted for evidence.

If the determination or decision is based on medical-vocational considerations, it must always contain findings that the

individual is not engaging in SGA; there is a severe impairment, but that the individual's impairment(s) does not meet or equal that of any impairment described in the Listing of Impairments; must describe the individual's specific RFC; and must sequentially relate it to physical and mental demands of past work or other substantial work to which the individual could or could not be expected to make a vocational adjustment by reason of her or his age, education and past work experience. Each finding of fact must be based on supporting evidence.

In the rationale for a denial, a mere conclusion that "the impairment(s) is not severe enough to prevent the claimant from engaging in SGA" is insufficient. If the evidence establishes that the impairment(s) is "not severe," the rationale *must* show that the impairment(s) would not significantly affect the performance of basic work-related functions. If a denial may not be made on this basis, the rationale must reflect the remainder of the sequential evaluation process.

Similarly, an allowance based on a mere conclusion that the claimant is "not able to engage in SGA" is insufficient. The rationale *must* state fully the reasons for the inability to engage in SGA based on the evidence of record, the applicable regulations, and the determinative step in the sequential evaluation process. Under the regulations, a finding that an individual's impairment(s) does not meet or equal the Listing efffectively indicates that he or she has a sufficient work capability at the sedentary or a higher exertional level, to require medical-vocational evaluation. Therefore, an allowance determination or decision based on a conclusion that "the claimant has no RFC" is never appropriate. If the impairment(s) does not meet or equal the Listing, the rationale *must* reflect the remainder of the sequential evaluation process. If the claimant does not, in fact, have the RFC for a full range of sedentary work, the case must be evaluated within the framework of the vocational rules. The functional restrictions which limit the claimant to less then the full range of sedentary work

must be specified. It must then be determined whether, considering all of the functional limitations, a "significant number" of sedentary jobs which the claimant can perform exists in the national economy.

Where denial is on the basis of duration, if based on medical-vocational considerations, the projected RFC must similarly be described and related.

EFFECTIVE DATE: The policy explined herein was effective on August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566).

CROSS-REFERENCES: Program Operations Manual System, sections DI 2102-2102B, 2103, 2105, 2380, and 2383.

No. 85-1409

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JANET J. YUCKERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

This case presents a single and straightforward question of law: whether the "severity" regulation promulgated by the Secretary of Health and Human Services in the administration of the disability program under Title II and Title XVI of the Social Security Act is invalid on its face. The court of appeals so held. That holding, however, is clearly wrong. As we demonstrate in our opening brief, the severity regulation is firmly supported by the text of a number of provisions of the Social Security Act (Gov't Br. 19-28) and by the legislative history of the 1954, 1967 and 1984 Amendments to the Act (Gov't Br. 30-33, 38-41, 43-49. As we further demonstrate, the principle on which the severity regulation is premised—that benefits may be denied solely on the basis of medical evidence that the claimant's impairment is relatively minor—has been an important feature of the disability program since its inception in 1954 and has been applied to millions of claims since that time (Gov't Br. 34-38, 41-43, 49-50).

Respondent for the most part simply ignores the compelling legislative and administrative support for the severity regulation, and the amici supporting respondent do not even attempt to rebut our submission in this re-

gard. Respondent's challenge to the regulation instead rests almost entirely on 42 U.S.C. 423(d)(2)(A), which in her view requires consideration of the claimant's age, education, and work experience in every case. That interpretation is refuted by the language of Section 423(d)(2)(A), which merely prescribes several necessary (but not sufficient) conditions of eligibility; it does not prohibit a threshold screening mechanism under which the claimant may be denied benefits if he cannot even demonstrate that he has a medically severe impairment. The legislative history confirms that interpretation and manifests no intention to invalidate the then-existing version of the severity regulation, which had been promulgated in 1960 to implement the basic definition of the term "disability" in 42 U.S.C. 423(d)(1)(A).

Contrary to respondent's (and amici's) contention, the current version of the severity regulation merely carries forward and clarifies the substantive standard of medical severity under the 1960 regulation, and it therefore is likewise fully consistent with both 42 U.S.C. 423(d)(1)(A) and (2)(A). In any event, and again contrary to respondent's contention, the text and legislative history of the Social Security Disability Benefits Reform Act of 1984 make unambiguously clear that Congress has ratified the *current* version of the severity regulation. For this reason, respondent's and amici's extended discussion of alleged differences between the current and prior versions of the regulation, the relative numbers of claims denied under each, and the wisdom of labeling the current regulation a "de minimis" standard is quite beside the point.

A. We note at the outset that nothing in respondent's submission detracts from the manifest reasonableness of the severity regulation as a matter of common sense and administrative efficiency. It provides that an application for disability benefits will be denied—without specific consideration of the claimant's ability to perform his previous work or other jobs, in light of the so-called "vocational" factors of age, education and work experience—if the claimant fails to establish on the basis of medical evi-

dence alone that his impairment is "severe." However, the regulation evaluates the severity of an impairment not as an abstract medical matter, but in concrete, work-related terms. Thus, an impairment will be found non-severe only if it does not "significantly limit[] [the claimant's] physical or mental ability to do basic work activities" (20 C.F.R. 404.1520(c))—*i.e.*, "the abilities and aptitudes necessary to do most jobs," such as walking, standing, lifting, seeing, hearing, and understanding or carrying out instructions (*id.* § 404.1521(b)). Moreover, although the vocational factors are not considered at step two, Social Security Ruling (SSR) 85-28 explains: "An impairment or combination of impairments is found 'not severe' and a finding of 'not disabled' is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work *even if the individual's age, education, or work experience were specifically considered* (*i.e.*, the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities)" (Pet. App. 41a (emphasis added)).

Such a modest threshold requirement of medical severity should be entirely unobjectionable in a program in which eligibility is fundamentally premised on *medical* disability, not an adverse vocational profile. And indeed respondent and amici concede that *some* threshold medical standard is permissible if its application is limited to screening out claimants who have what they term "de minimis" impairments. It thus is not clear to what extent respondent and amici now actually challenge the facial validity of the severity regulation.

It does seem clear, however, that respondent and amici fail to appreciate that there are two distinct but overlapping functions served by the severity regulation: (i) it assures that disability benefits are paid only to those individuals for whom a significant medical impairment is actually a primary cause of their inability to work; and (ii) it screens out at an early stage those

claimants who, it may reasonably be presumed, would not be found disabled even if the Secretary were to undertake a full-blown vocational assessment. Respondent and amici address only the second purpose, arguing that the regulation is invalid to the extent it is applied to screen out *any* individual claimant who *might* be found to be disabled if his ability to perform his previous work and his age, education and work experience were specifically considered. See Resp. Br. 22-24. However, if pushed too far, this position would effectively require an individualized assessment of the claimant's vocational factors in every case, thereby sacrificing uniformity and ease of administration and causing vocational considerations to overshadow the central importance of a medical impairment.

The balancing of these competing considerations in the implementation of the statutory definition of "disability" has been entrusted by Congress to the "'exceptionally broad authority'" of the Secretary under 42 U.S.C. 405(a), and the Secretary's regulations must be sustained unless they exceed the Secretary's statutory authority or are arbitrary and capricious. See *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). Respondent does not contend that the severity regulation is arbitrary and capricious, but she does contend that the regulation exceeds the Secretary's statutory authority.

B. Respondent's argument that the severity regulation is inconsistent with the Social Security Act rests almost entirely on 42 U.S.C. 423 (d) (2) (A), which was enacted as part of the 1967 Amendments (§ 158(b), 81 Stat. 868). See Resp. Br. 19-22, 28, 39. This reliance is misplaced for three reasons.

1. The first flaw in respondent's reliance on an asserted inconsistency between the severity regulation and Section 423(d) (2) (A) is that any such inconsistency has been rendered irrelevant by Congress's supervening ratification of the severity regulation when it passed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*

a. The 1984 Amendments enacted the new 42 U.S.C. (Supp. II) 423(d) (2) (C), which codifies the concept of a "severe" impairment (emphasis added)):

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient *medical severity* that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a *medically severe* combination of impairments, the combined effect of the impairments shall be considered *throughout the disability determination process.*

Respondent attempts to brush aside this statutory provision with the assertion (Br. 41) that it "made no change in the 1954 definition of disability other than to require the Secretary to consider the combined effect of all of an individual's impairments on his ability to work." We of course agree with respondent that the 1984 Amendments made no change in the underlying definition of "disability," but that is irrelevant. The critical point for present purposes is that the first sentence of the new Section 423(d) (2) (C) expressly provides that the Secretary may continue to make the threshold assessment of "medical severity" at step two of the "disability determination process." Furthermore, the second sentence of Section 423(d) (2) (C) expressly contemplates that the subsequent steps of that process—including steps four and five, at which the Secretary considers the claimant's ability to perform his past work and his age, education and work experience—will be reached only if the Secretary first "does find" a "medically severe" impairment. Thus, congressional authorization for the sequential evaluation process, including the severity regulation, is now set forth in the Social Security Act itself.

Despite this explicit statutory text, respondent contends (Br. 40, 42-43) that Congress in 1984 at most intended to ratify not the threshold medical standard embodied in

the Secretary's published regulations, but some *other* standard, under which the Secretary could determine only whether the claimant's impairment is "slight" or "de minimis" in the abstract and would be required in every case to make at least an implicit evaluation of the claimant's age, education, and work experience. This contention is refuted by the language of Section 423(d)(2)(C), which states the test to be whether an impairment is medically "severe"—the precise term used in the regulation respondent challenges.

b. Any remaining doubt about whether Congress intended to ratify the severity regulation is dispelled by the legislative history of the 1984 Amendments. The Senate Report states that under "[p]resent law," "[m]edical considerations alone can justify a finding of ineligibility where the impairment[] is not severe," and that "[a]n impairment is nonsevere if it does not significantly limit the individual's physical or mental capacity to perform basic work-related functions." S. Rep. 98-466, 98th Cong., 2d Sess. 22 (1984). The "present law" to which the first passage just quoted refers of course is the severity regulation. The second passage in turn is essentially a quotation of that regulation, the next sentence of which expressly informs the claimant that the Secretary "will *not* consider [his] age, education, and work experience" at that step (20 C.F.R. 404.1520(c) (emphasis added)). The Senate Report then specifies that the new statutory directive to consider the combined effect of multiple impairments (i) "is to be applied in accordance with the existing sequential evaluation process," and (ii) "requires the Secretary to determine first, on a strictly medical basis and without regard to vocational factors, whether the individual's impairments, considered in combination, are medically severe" (S. Rep. 98-466, *supra*, at 22).

Respondent does not dispute that the Senate Report reflects unqualified approval of the severity regulation, but she contends (Br. 43) that the Conference Committee "rejected" the Senate's approach. Respondent is simply wrong. The House Report likewise eschewed any intention to mandate a change in the sequential evaluation process, beyond requiring consideration of the combined effect of multiple impairments. H.R. Rep. 98-618, 98th Cong., 2d Sess. 6-8 (1984). Because the House and Senate were in basic *agreement*, there was no occasion for the Conference Committee to "reject" the Senate's approach.[1] Moreover, the Conference Report also expressly approves the severity regulation. It states: (i) that "interests of reasonable administrative flexibility and efficiency" permit a finding of no disability if an impairment is "slight enough to warrant a presumption, even without a full evaluation of vocational factors, that the individual's ability to perform [substantial gainful activity] is not seriously affected"; (ii) that the "current 'sequential evaluation process' allows such a determination"; (iii) that a non-severe impairment for these purposes is " 'one which does not significantly limit basic work-related functions' "; and (iv) that there was no intention to "impair the use of that process" (H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29-30 (1984)). The Conference Report thus reinforces the conclusion that Section 423(d)(2)(C) ratified the severity regulation.

This conclusion is further reinforced by the remarks of Senator Long during the floor debate on the Conference Report (see Gov't Br. 47-49 & n.28). Senator Long observed that "[s]ome courts"—like the court below (see Pet. App. 5a, 9a)—"have ruled that the Secretary cannot deny claims solely on the basis that the individual has no severe medical condition but must always make an evaluation of vocational capacities" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984)). But Senator Long made clear that Congress rejected this notion, stressing

---

[1] The Conference Report states that, as relevant here, the Senate bill was the "[s]ame" as the House bill and that the Senate provision merely "*clarifie*[*d*] that the requirement applies to the determination of whether the individual has a combination of impairments which are *medically* severe, without regard to age, education, or work experience." H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 29 (1984) (first emphasis added).

that the bill was "carefully drawn to reaffirm the authority of the Secretary to limit benefits to only those individuals with conditions which can be shown to be severe enough from a strictly medical standpoint—that is, without vocational evaluation" (*ibid.*).

Respondent attempts (Br. 43 n.25) to avoid the force of Senator Long's remarks by labeling them "partisan" and "post-conference." However, Senator Long was one of the principal sponsors of the disability program when it was enacted in 1956 (S. Rep. 2133, 84th Cong., 2d Sess. 140 (1956) (minority views); 102 Cong. Rec. 13052-13054 (1956)); was the Chairman of the Finance Committee at the time of the 1967 Amendments, upon which respondent relies (S. Rep. 744, 90th Cong., 1st Sess. 1 (1967)); and was the ranking minority member of the Conference Committee on the 1984 Amendments (H.R. Conf. Rep. 98-1039, *supra*, at 46). He therefore spoke with unique authority on the disability program and the 1984 Amendments, and his explanation of the Conference Report is significant precisely because it was "post-conference," especially since no Member of the House or Senate expressed a contrary view.[2]

2. Even if Congress's ratification of the severity regulation in 1984 were put to one side, respondent's reliance on an alleged inconsistency with 42 U.S.C. 423(d)(2)(A) would be without merit. The original version of the severity regulation was formally promulgated in 1960,[3]

[2] Respondent also contends (Br. 43 n.25) that Senator Long's remarks are not a "reliable" indicator of congressional intent because they reiterated the views in the Senate Report, which, respondent contends, were "rejected" in conference. However, to the extent there were differences between the two bills, Senator Long explained that the Conference bill "follow[ed] the *Senate* approach," not the House formulation, because the latter "might have been misinterpreted so as to raise a question about the ability of the Department to deny benefits at the initial stage of evaluation on the basis that there is no severe medical impairment" (130 Cong. Rec. S11458 (daily ed. Sept. 19, 1984) (emphasis added)).

[3] 25 Fed. Reg. 8100 (1960); Gov't Br. 36. As we explain in our opening brief (at 34), the interpretation embodied in the 1960 regulation previously had been reflected in the *Disability Freeze State Manual*, issued in 1955. Respondent cites (Br. 35 n. 20) provisions of that *Manual* that addressed the circumstances in which age, education, and work experience would be considered. However, those provisions do not undermine the *Manual*'s explicit instructions that "[i]n the great majority of cases" the state agency would be able to evaluate the applicant's impairment solely on the basis of its "level of severity," and that the non-medical factors of age, education and experience should be considered only if a realistic assessment could not be made on the basis of "medical factors." Section 304.B (Gov't Br. 34). The same point is made in a 1958 booklet entitled "Disability and Social Security":

> [T]here are some obvious cases where the medical facts may be controlling. For example, where the only impairment is a moderate neurosis, moderate impairment of sight or hearing, or any other moderate abnormality, it would be obvious on the basis of medical considerations alone that the facts would not justify favorable determinations.

Quoted in Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess., *Disability Insurance Fact Book: A Summary of the Legislative and Administrative Development of the Disability Provisions in Title II of the Social Security Act* 21-22 (Comm. Print 1959). These instructional materials refute respondent's contention (Br. 2, 32-33) that under the 1957 regulations (22 Fed. Reg. 4362 (Gov't Br. 38 n.22)), an inquiry into the claimant's education, training, and work experience was required in every case.

well before Section 423(d)(2)(A) was enacted in 1967, and its validity therefore does not depend on that section. Rather, the 1960 regulation implemented—and, as respondent concedes (Br. 2, 32-33), was fully consistent with—the basic definition of the term "disability" in Section 423(d)(1)(A).

Section 423(d)(1)(A) states that the term "disability" shall mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." The statutory requirement that the claimant's alleged inability to work be "by reason of" a "medically determinable" impairment strongly supports a threshold test of medical severity, because it ensures, on a uniform basis, that the claimant's impairment is sufficiently major to justify its

consideration as the primary or substantial cause of his inability to work. See Gov't Br. 33. The central role of medical considerations is what distinguishes a disability program from other forms of unemployment assistance.[4] This interpretation is supported by the House and Senate Reports on the 1954 Amendments, which stress that disability evaluation has two aspects: the claimant must have "a medically determinable impairment of serious proportions," and there must be an inability to work "by reason of such impairment." H.R. Rep. 1698, 83d Cong., 2d Sess. 23 (1954); S. Rep. 1987, 83d Cong., 2d Sess. 21 (1954). Respondent does not dispute, or even discuss, these dispositive aspects of the text and legislative history of the basic definition of "disability" in 42 U.S.C. 423(d)(1)(A).[5]

[4] This was the contemporaneous construction of the definition of disability in the *Disability Freeze State Manual* of 1955. Sections 310-319 of the *Manual* elaborated upon the statutory terms. Section 314, entitled "By Reason of an Impairment," stated: "The impairment must be sufficiently severe to be the cause of inability to work." A similar explanation of the "by reason of" language was offered by Deputy Director Robert Ball during the extensive House oversight hearings in 1959. See Gov't Br. 36-37 n.21. In its report issued after those hearings, the Subcommittee likewise stated that "the individual's impairment must be the primary cause of the lack of capacity" (Subcomm. on Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 2d Sess., *Administration of the Social Security Disability Insurance Program: Preliminary Report* 19 (Comm. Print 1960)). The report explained that a "chronic condition" in an older worker that might affect his ability to find a job, but is not a "major handicap," does not qualify him for benefits; and it emphasized the distinction between a disability program, under which the failure to work must be attributable to a "major medical impairment," and an unemployment benefits program (*id.* at 19-20).

[5] Respondent does take issue (Br. 33) with our reliance (Gov't Br. 30-31) on statements in the House and Senate Reports that the claimant must be "totally" disabled (H.R. Rep. 1698, *supra*, at 23; S. Rep. 1987), *supra*, at 20), contending that there is no suggestion that those references were intended to "preclude" consideration of vocational factors. Respondent misunderstands our submission. We argued only that the emphasis on "total" disability suggested the prerequisite of a major impairment, not that

Nor is there any merit to respondent's contention (Br. 7, 19-20, 24 n.12, 25-26) that the severity regulation permits only an "abstract medical assessment" and is inconsistent with the Act's definition of disability "in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace" (*id.* at 19-20, quoting *Heckler* v. *Campbell*, 461 U.S. 458, 459-460 (1983)). The prior version of the regulation stated the test to be whether the impairment was "slight," a standard that was criticized by the Comptroller General and state agencies as vague. See Gov't Br. 42 n.24. By contrast, under the current version, the severity of the impairment is evaluated in terms of its effect on the claimant's capacity to perform basic activities that are necessary for most jobs, and therefore is directly tied to

Section 423(d)(1)(A) *precludes* consideration of vocational factors in all circumstances. Respondent's reliance (Br. 33-34) on SSA State Letter No. 174, issued in 1952, is misplaced for the same reason. Moreover, that Letter stated that the impairment must be of "major importance" (§ 3820 para. 1) and that "[i]n many cases, no decision as to total disability can be made without such social data as will describe the individual's education and work history" (*ibid.* para. 2), thereby implying that in some cases such information was not necessary.

Respondent also argues (Br. 34-35) that we quote out of context the portion of the 1954 Senate Report that refers to the development of standards for evaluating disability (see Gov't Br. 31-32), because the Report goes on to say that the standards "will reflect the requirement that the individual be disabled not only for his usual work but also for any type of substantial gainful activity" (S. Rep. 1987, *supra*, at 21) However, nothing in this passage undermines the requirement that the claimant have a severe impairment (the Senate Report itself describes impairments of "serious proportions") or suggests that such a requirement cannot be included among the contemplated "standards."

Finally, the testimony during the 1959 oversight hearings that respondent quotes (Resp. Br. 36-37) simply explains that a claimant may be found disabled even if his impairment is not so severe as to meet the listing of presumptively disabling impairments (compare 20 C.F.R. 404.1520(d)) and that an impairment may have a more serious impact on some persons than on others. These statements have no bearing on the issue presented in this case.

the central question of whether the claimant's inability to work is actually due to an impairment.[6]

3. Finally, even focusing narrowly on Section 423(d)(2)(A), as respondent urges, the severity regulation is well within the Secretary's statutory authority. That section provides that "an individual * * * shall be determined to be under a disability *only if* his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (emphasis added). Especially in light of the phrase "only if," this language merely states necessary (but not sufficient) conditions of eligibility. Nothing suggests that it prescribes the *only* relevant conditions. In particular, Section 423(d)(2)(A) does not call into question the validity of the 1960 regulation that permitted the denial of benefits on medical grounds alone, without regard to the claimant's age, education, and work experience. Rather, as respondent concedes (Br. 39), Section 423(d)(2)(A) was enacted for the distinct purpose of further *restricting* eligibility by overturning judicial holdings that a claimant was disabled if he was unable to do his past work and there were no other jobs in the immediate vicinity for which he might be hired. H.R. Rep. 544, 90th Cong., 1st Sess. 28-30 (1967). This purpose is demonstrated by the provision in Section 423(d)(2)(A) that the claimant must be unable to do any substantial gainful work that exists in the national economy, "regardless of whether such work exists in the immediate area in which he lives,

[6] There also is no merit to respondent's contention (Br. 21, 25-26) that the severity regulation prevents the individualized assessment of disability contemplated by *Heckler* v. *Campbell*, 461 U.S. at 467. The determination whether an impairment significantly limits the claimant's ability to perform basic work-related functions assures the requisite assessment of "each claimant's individual abilities" (*ibid.*).

or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."[7]

Moreover, as we explain in our opening brief (at 40-41), the House and Senate Reports on the 1967 Amendments describe three distinct eligibility requirements in terms that directly parallel steps two, four and five of the sequential evaluation process adopted in 1978. The first of those requirements is that the individual must have "a *severe* medically determinable physical or mental impairment or impairments" (S. Rep. 744, *supra*, at 48-49 (emphasis added); H.R. Rep. 544, *supra*, at 30). This passage clearly contemplates that the Secretary may deny benefits on the basis of medical evidence alone, whether the applicable test is phrased in terms of whether the impairment is not "severe" (as under the current regulations that use the Reports' term) or "slight" (as under the version of the regulations in effect in 1967).

Respondent relegates her discussion of this legislative history to a footnote, contending that it is "'somewhat ambiguous'" and that it "'can be read'" simply as an explanation of the overall circumstances in which a finding of non-disability may be made, rather than as a "'fixed sequence'" of screening steps. Resp. Br. 38 n.22, quoting *Dixon* v. *Heckler*, 589 F. Supp. 1494, 1505 (S.D. N.Y. 1984), aff'd, 785 F.2d 1102 (2d Cir. 1986), petition

[7] Respondent contends (Br. 3, 20 n.10, 39) that because the disability determination for surviving spouses under 42 U.S.C. 423(d)(2)(B) is based solely on the level of impairment severity, without consideration of age, education, and experience, the omission of any comparable limitation in the contemporaneously enacted Section 423(d)(2)(A) forecloses that approach for other claimants. This contention is without merit. The regulation permitting the denial of benefits to other claimants based on medical factors alone was in existence prior to 1967, and it implemented Section 423(d)(1)(A), not the 1967 Amendments. Moreover, the fact that Congress precluded consideration of age, education, and work experience for surviving spouses scarcely establishes that Congress intended to *require* such consideration in all other cases. At most, the inference would be only that Congress intended to *permit* such consideration in appropriate circumstances, as the sequential evaluation process allows.

for cert. pending, No. 86-2. But even if the statutory language and legislative history were ambiguous (which they are not), the Secretary's construction of the 1967 Amendments as *permitting* both the former and current versions of the severity regulation plainly is reasonable, and therefore must be sustained. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984). That is especially so in light of the accommodation between the severity regulation and Section 423(d)(2)(A) in practical application. SSR 85-28 explains that an impairment will be found to be non-severe only when the medical evidence establishes that it "would have no more than a minimal effect on [the] individual's ability to work even if the individual's age, education, or work experience were specifically considered" (Pet. App. 41a). As respondent appears to concede (Br. 22-23), under this interpretation, the severity regulation is not insensitive to the vocational factors of age, education and work experience referred to in Section 423(d)(2)(A).[8]

C. Respondent, joined by several amici, also contends that the severity regulation is inconsistent with the allocation of the burden of proof in what respondent maintains should be a "two-stage" inquiry (Resp. Br. 20-21), under which the claimant may establish a prima facie case by showing an inability to perform past work and the burden then shifts to the Secretary to show that the claimant is able to perform other work that exists in the national economy. See Resp. Br. 20-21, 23, 24-25, 26, 28-29, 39, 47 n.29; States Amicus Br. 6 & n.6, 15-16, 26-27; Cities Amicus Br. 13-16. There are a number of flaws in this contention:

1. Nothing in the Social Security Act rigidly confines disability determination to a "two-step" process. The Secretary has " 'exceptionally broad authority' " (*Heckler*

[8] Because SSR 85-28 is only interpretative and clarifying, it was not necessary, contrary to respondent's contention (Br. 29-30), for its publication to be preceded by notice and an opportunity for comment under 42 U.S.C. (Supp. II) 421(k). See 5 U.S.C. 553(b)(A).

v. *Campbell*, 461 U.S. at 466) to "regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same" in disability cases. 42 U.S.C. 405(a). Pursuant to that authority, the Secretary has established a *five*-step disability determination process, which includes separate steps for the determination of impairment severity and ability to do past work. Respondent and amici have not shown that this is an arbitrary and capricious means for implementing the statutory definition of disability.

2. The allocation of the burden of proof under the case law upon which respondent and amici rely applies to the *vocational* aspects of disability determinations, and that allocation in fact is fully respected at those steps of the sequential evaluation process where the vocational aspects are considered. Thus, the claimant bears the burden of proof through the first four steps of the sequential evaluation process. If the claimant demonstrates at step four that he is unable to perform his previous work, then the burden shifts to the Secretary at step five to identify (often by reference to the medical/vocational guidelines) other jobs in the national economy that the claimant can perform. *Heckler* v. *Campbell*, 461 U.S. at 460. See, *e.g.*, *Brown* v. *Bowen*, 794 F.2d 703, 706 (D.C. Cir. 1986); *Goodermote* v. *Secretary of HHS*, 690 F.2d 5, 7 (1st Cir. 1982); *Bluvband* v. *Heckler*, 730 F.2d 886, 891 (2d Cir. 1984); *Rivera* v. *Schweiker*, 717 F.2d 719, 722-723 (2d Cir. 1983.[9]

[9] Respondent's reliance (Br. 28-29) on a 1986 House Committee Print in support of her contention that the severity step of the sequential evaluation process is inconsistent with burden-of-proof rules is seriously misleading. The Committee Print explains that "[t]he adjudication of claims is accomplished on a sequential basis" and describes the first four steps of that process, including the "not severe" determination at step two and the past work determination at step four. The print then states that "[a]t *this* stage [*i.e.*, at step *five*], because of a judicial opinion and subsequent administrative and legislative ratification, the burden of proof switches to the Government" to show that the individual can perform other work in the national economy. House Comm. on Ways and Means, 99th Cong., 2d Sess., *Background Material and Data on Programs*

3. The severity regulation does not conflict with the policies underlying the burden-shifting rule upon which respondent and amici rely. The allocation of the burden on vocational questions reflects the parties' relative expertise and access to information: although it is fair to require the claimant to prove that he is unable to perform a job he has done in the past and with which he therefore is familiar, the question whether there are other jobs in the national economy that a person with the claimant's functional limitations could perform concerns matters outside the claimant's knowledge and is properly committed to the Secretary, who may obtain the assistance of experts who are familiar with job requirements and markets. See *Kerner* v. *Flemming*, 283 F.2d 916, 922 (2d Cir. 1960) (Friendly, J.). However, step two of the sequential evaulation process, at issue here, does not address these vocational factors or require the claimant to assume the Secretary's burden of identifying jobs in the national economy that he could perform. Rather, the claimant must show that his own medical condition significantly limits his abilities and aptitudes, a matter within his knowledge and capacity to prove. See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

4. Whatever inference of inconsistency might be drawn from the judicial decisions upon which respondent and amici rely, the fact remains that Congress ratified the "current 'sequential evaluation process' " when it enacted the 1984 Amendments, expressly disavowing any intent to "impair" the operation of that process. H.R. Conf. Rep. 98-1039, *supra*, at 30; H.R. Rep. 98-618, *supra*, at 8; S. Rep. 98-466, *supra*, at 28. That congressional approval necessarily encompassed the feature of the sequen-

Within the Jurisdiction of the Committee on Ways and Means, 112-113 (Comm. Print 1986) (emphasis added). The statement in the 1978 preamble to the sequential evaluation regulations that "[t]he burden of proof remains as established by the case law and observed by SSA" (43 Fed. Reg. 55359)—which respondent and amici cite (Resp. Br. 4, 28; Cities Amicus Br. 15)—likewise referred to the shifting of the burden of proof at steps four and five of the sequential evaluation process.

tial evaluation process by which the determination of the claimant's ability to perform his own past work—and the resultant shifting of the burden to the Secretary to show the existence of other jobs if he cannot—will occur only if the claimant first establishes at step two that he has a severe impairment.[10]

5. The practical application of the severity regulation in any event gives due regard to factors bearing on the ability to do past work. As SSR 85-28 explains with respect to the current severity regulation (Pet. App. 43a):

> By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work.

SSR 85-28 further states that under current procedures, if the "evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work," the claim will not be denied at step two and the decision-maker will undertake "further evaluation of the individual's ability to do other work considering age, education and work experience" (*ibid.*). Compare *McDonald* v. *Secretary of HHS*, 795 F.2d 1118, 1126 (1st Cir. 1986).

D. Respondent and amici also contend that the current version of the severity regulation is invalid because, in their view, it imposes a heavier burden on the claimant than did the pre-1978 version, which they characterize as stating a "de minimis" test. Resp. Br. 5-8, 18, 23-27, 31 n.18, 33, 38-40, 43; States Amicus Br. 14-20, 26-28.

[10] SSR 82-55 and 82-56, which are reproduced in the appendix to respondent's brief, made clear that the severity regulation does not focus on the claimant's ability to do his past work. Resp. Br. App. 3a, 9a. The Senate and Conference Reports on the 1984 Amendments quote another portion of those rulings (S. Rep. 98-466, *supra*, at 22; H.R. Conf. Rep. 98-1039, *supra*, at 29), which indicates that Congress was fully aware of the portions relevant to this case as well.

The complete answer to this contention is that it was the *current* version of the regulation, not the prior version or some hypothetical "de minimis" standard, that Congress ratified in 1984. The new 42 U.S.C. (Supp. II) 423 (d)(2)(C) uses the term "severe" from the current regulation, and the legislative history demonstrates Congress's understanding that an impairment is non-severe for these purposes if it does not "significantly limit[]" the claimant's "ability to do basic work activities" (20 C.F.R. 404.1520(c)). See H.R. Conf. Rep. 98-1039, *supra*, at 29-30; S. Rep. 98-466, *supra*, at 22. In light of Congress's action in 1984, respondent's and amici's discussion of whether the current version of the severity regulation differs in substance from the prior version and whether the requirement of a "significant" limitation on the claimant's work-related abilities is a "de minimis" test has no relevance here.

In any event, the revision of the regulation in 1978 was *not* intended to work a substantive change. As respondent and amici concede (Resp. Br. 4; States Amicus Br. 17; Cities Amicus Br. 21-23), the Secretary stated when the sequential evaluation regulations were first proposed in 1978 that they were "not intended to alter the levels of severity for a finding of disabled or not disabled on the basis of medical conditions alone" (43 Fed. Reg. 9297 (1978)), and the Secretary reiterated that position when the regulations were promulgated in final form (*id.* at 55358).

Respondent contends (Br. 6), however, that the Secretary acknowledged in 1980 that he had "effected a substantive change back in 1978." Respondent relies on passages in the preamble to the 1980 revision stating that "[a]lthough the evaluation approach to impairments that are not severe has been in the regulations for some time, we expanded it in 1978," and that "greater program efficiency would be obtained by limiting the number of cases in which it would be necessary to follow the vocational evaluation sequence" (45 Fed. Reg. 55574 (1980)). Contrary to respondent's contention, however, these passages do not state that the threshold standard of severity was

increased. Rather, they refer to an expansion of the severity approach through a broader application of the *same* substantive test by clarifying that test and requiring that *all* claims be screened against it. Prior to 1978, the regulations did not prescribe a series of fixed checkpoints that effectively required a decision on the question of impairment severity in every case before vocational factors were considered. Accordingly, claims that could have been denied because the impairment was slight often were instead denied, after a full-blown vocational evaluation, on the ground that the claimant retained the capacity to do his past work or other work. By requiring the decision-maker to evaluate the severity of every claimant's impairment and by clarifying the operative standard, the new sequential evaluation regulations were expected to screen out a greater number of insubstantial claims at the outset. It was in this way, not by a change in the substantive standard, that those regulations "limit[ed] the number of cases in which it would be necessary to follow the vocational evaluation process" (*id.* at 55574).[11] The Appeals Council confirmed in 1980 that the new regulations were "not intended to change, but [were] merely a clarification of" the prior "slight impairment" standard. *Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations* (1980), quoted in *Brady* v. *Heckler*, 724 F.2d 914, 919-920 (11th Cir. 1984).

The statistics cited by respondent and amici (Br. 4; States Amicus Br. 21) showing that the percentage of claims denied on non-severe grounds rose from 8.4% in 1975 to 41.6% in 1981 (and then decreased to 23.1% in 1985) likewise do not establish any substantive change in the threshold level of medical severity under the 1978 regulations. Most of the increase occurred before those regulations even became effective in February 1979. Moreover, Congress has been fully aware of these trends and recognized that they resulted from the clarification of

[11] See SSA, Not Severe Impairment Workgroup, "Final Report and Recommendations," at 6 (Aug. 23, 1983) (Resp. Br. 7-8; States Amicus Br. App., Exh. L).

No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

—v.—

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, LUPUS FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY, SAVE OUR SECURITY, ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS AND PLAINTIFF CLASS MEMBERS OF *BAILEY* v. *BOWEN*, *DIXON* v. *BOWEN*, *JOHNSON* v. *BOWEN*, *McDONALD* v. *BOWEN* AND *WILSON* v. *BOWEN*.

[List of Counsel on Next Page]

30 pp

BARBARA ELKIN
EPILEPSY FOUNDATION
OF AMERICA
4351 Garden City Drive
Suite 406
Landover, MD 20785
(301) 459-3700

ELIZABETH JAMESON
1663 Mission Street
Fifth Floor
San Francisco, CA 94103

KALMAN FINKEL
JOHN E. KIRKLIN
NANCY MORAWETZ*
THE LEGAL AID SOCIETY
11 Park Place
Room 1805
New York, NY 10007
(212) 406-0745

ROBERT E. LEHRER
JOSEPH A. ANTOLIN
JOHN BOUMAN
SHELLEY DAVIS
LEGAL ASSISTANCE FOUNDATION
OF CHICAGO
343 South Dearborn Street
Chicago, IL 60604
(312) 341-1070

SARAH F. ANDERSON
GREATER BOSTON LEGAL
SERVICES
68 Essex Street
Boston, MA 02111
(617) 357-5757

FREDERICK M. STANCZAK
SUSQUEHANNA LEGAL
SERVICES
416 Pine Street
Williamsport, PA 17701
(717) 323-8741

RICHARD E. YASKIN
JACOBS & SCHWALBE, P.C.
ASHLAND OFFICE CENTER
Voorhees, NJ 08043
(609) 429-6562

STEPHEN LOFFREDO
WASHINGTON SQUARE
LEGAL SERVICES
715 Broadway
New York, NY 10003
(212) 505-7400

STANLEY FREEMAN
WHITE, FINE & VERVILLE
1156 15th Street, N.W.
Washington, D.C. 20036
(202) 659-2900

* *Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1409

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

—v.—

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, LUPUS FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY, SAVE OUR SECURITY, ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS AND PLAINTIFF CLASS MEMBERS OF *BAILEY* v. *BOWEN*, *DIXON* v. *BOWEN*, *JOHNSON* v. *BOWEN*, *McDONALD* v. *BOWEN* AND *WILSON* v. *BOWEN*.

INTERESTS OF AMICI CURIAE

Amici are organizations representing disabled persons and plaintiff class members of certified class actions challenging application of the "severity" regulation that is at issue in this case. Because amici represent disabled persons who have been illegally denied benefits under the Secretary's severity regulation, they have a clear interest in ensuring that this Court is presented with a full picture of the Secretary's use of the severity regulation to deny benefits to eligible claimants.

1. Amici Organizations

The American Diabetes Association ("ADA") is a non-profit organization that has over 800 affiliates and chapters nationwide and more than 220,000 members, including lay persons, physicians, research scientists, nurses, dietitians, and educators. The purpose of the ADA is to promote research relating to curing and preventing diabetes, and to improve the well-being of people with diabetes and their families. The disease often leads to serious complications, including blindness, heart disease, kidney failure, and circulatory problems leading to amputations. Even in the early stages of development, diabetes and/or these complications can prevent persons with diabetes from performing substantial gainful work. The case history of the amputee with diabetes whose disability was termed not severe, described more fully at page 13 *infra*, is representative of the illegal and unjustifiable results which the Secretary's practices under the severity regulation impose upon the ADA membership and others.

The National Multiple Sclerosis Society ("NMSS") is a non-profit organization which is comprised of 105 chapters with over six hundred thousand members nationwide. Since it was organized in 1946, NMSS has been dedicated to promoting the cure, treatment and prevention of multiple sclerosis ("MS") and to improving the quality of life and enhancing independence for persons with MS. MS is a highly unpredictable and variable neurological disease that often produces serious functional impairment. The variable course of the disease requires a careful evaluation of both vocational factors and medical evidence in assessing the extent to which people with MS are incapable of performing substantial gainful work.

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interest of the over 2 million Americans with epilepsy through research, vocational programs, public information and education, professional awareness, and advocacy. The Epilepsy Foundation of America has a long-standing interest and commitment to secure the legal rights of persons with disabilities.

The Lupus Foundation of America is a private non-profit organization comprised of over 22,000 members. The Foundation was created in order to improve the standard of care and treatment of those individuals who suffer from lupus erythematosus. Lupus erythematosus is a disease of the immune system that often affects the kidney, brain, lungs, joints, and/or skin. One of the major goals of the Lupus Foundation of America is to work for the provision of programs and services that will directly improve the quality of life of all those who have the disease.

The National Mental Health Association is the nation's largest private, voluntary organization providing leadership to confront the entire range of issues impacting mental disorders and mental health at the local, state, and national level. Membership includes concerned citizens, current and former consumers of mental health services, family members whose loved ones suffer from mental illnesses, and mental health professionals. The Association strives to make mental health a major national priority.

The National Alliance for the Mentally Ill is a self-help organization of families of mentally ill persons, of mentally ill persons themselves, and of friends. Composed of more than 650 local and state Alliances for the Mentally Ill all across the country, totaling nearly 40,000 members, its goals are mutual

support, education and advocacy for the victims of mental illness, especially schizophrenia and manic and other disabling depressions.

Save Our Security ("S.O.S.") is a national advocacy coalition comprised of concerned individuals and over 100 organizations. It works to safeguard all aspects of Old Age, Survivors' and Disability Insurance, Medicare, Medicaid and Supplemental Security Income. In recent years, S.O.S. and its membership have worked to assure the fairness and accuracy of the Social Security and SSI disability evaluation process.

The Alliance of Social Security Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to the recent illegal denials and terminations of benefits to disabled Americans by the Social Security Administration. At this time, the Alliance has approximately 3,000 members in eighteen states.

All of the amici organizations believe that the Secretary has unlawfully employed the severity regulation to deny disability benefits to eligible claimants. In addition, many members of these organizations have been directly affected by the Secretary's practices because they have been denied benefits to which they are entitled under the Social Security Act.

2. Amici Plaintiff Class Members

The plaintiff class members in *Bailey*, *Dixon*, *Johnson*, *McDonald*, and *Wilson*,[1] are persons who have been denied or terminated from disability benefits because the Secretary classi-

1 *See Bailey* v. *Heckler*, No. 83-1797 (M.D. Pa. Dec. 3, 1985), *mod.*, Mar. 11, 1986, *appeal pending* 86-5038 & 86-5157 (3d. Cir.) (Pennsylvania, Delaware, Maryland, Virginia, West Virginia); *Dixon* v. *Heckler*, 589 F.Supp. 1494 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2) (New York); *Johnson* v. *Heckler*, 593 F.Supp. 375 (D. Ill. 1984), *aff'd*, 769 F.2d 1202 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (Mar. 11, 1986) (No. 85-1442) (Illinois); *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d 1118 (1st Cir. 1986) (Massachusetts); *Wilson* v. *Heckler*, 622 F.Supp. 649 (D.N.J. 1985), *aff'd*, 796 F.2d 36 (3d Cir. 1986) (New Jersey).

fied their impairments as not severe. As is set forth more fully below, these class members have been summarily denied disability benefits even though a substantial percentage of them are in fact disabled and could prove their eligibility for benefits if the Secretary would evaluate their disabilities in light of both medical and vocational considerations. The plaintiff class members have an unmistakable interest in the outcome of this case since the Secretary has argued on appeal that the preliminary and permanent injunctions in their cases should be reversed or vacated in light of this Court's decision in respondent's individual challenge to the severity regulation.

In addition to their interest in this case, amici are in an unusual position to present this Court with the available evidence on the Secretary's actual implementation of the severity regulation, as reflected in his instructions to staff, quality assurance directives, statistical evidence and the arguments he has made to various courts. This evidence, while extensive, is not complete since in some cases amici class members are still in the early stages of discovery. It is nonetheless highly relevant to an appraisal of the Secretary's description of his practices to this Court.

The available evidence shows that the Secretary's position in this Court is disingenuous. His representations on the intent and effect of the challenged regulation are betrayed by the way the Social Security Administration ("SSA") actually applied the regulation and by the Secretary's own prior representations to the courts of appeals. Furthermore, the Secretary improperly relies on a newly issued ruling—which was not applied to the respondent and whose general application has not been evaluated in a factual setting by any district court—to legitimize a regulation that the Secretary consistently employed to deny benefits to eligible claimants.

SUMMARY OF ARGUMENT

In his brief to this Court, the Secretary blurs the distinction between a legitimate *de minimis* severity step to screen out frivolous claims and a severity step regulation that operates to deny benefits to eligible claimants. At the same time, the Secretary assures the Court that he has consistently implemented the severity regulation as a *de minimis* standard.

The Secretary's description of the severity regulation squarely conflicts with the language of the regulation, the Secretary's instructions to his staff, all of the available statistical evidence, and with the Secretary's own representations to other courts. Although the Secretary acknowledges that the regulation may have been too "strictly applied" (Pet. Br. 10) and urges that a recent ruling will prospectively ensure a *de minimis* application of the regulation, he has neither amended the severity regulation nor informed his staff that his past instructions were wrong.

Because the Secretary has not altered his regulation and because that regulation was interpreted and implemented in a manner inconsistent with the Social Security Act, amici urge this Court to affirm the judgment below. Such a ruling will leave the Secretary free to promulgate new regulations setting forth an appropriate *de minimis* standard for screening out groundless claims. Even if this Court should conclude, however, that the severity regulation may now be construed narrowly as a *de minimis* screening mechanism, it should follow those courts that have adopted this reading of the regulation and remand respondent's case for a new evaluation under that narrow construction.

ARGUMENT

I.

The Social Security Act Does Not Permit A Severity Step That Operates As More Than A *De Minimis* Screening Mechanism

By its terms, the Social Security Act requires that the severity of a medically determinable impairment be evaluated in light of the claimant's ability to return to past work or to perform other substantial gainful activity in light of that claimant's age, education, and work experience. 42 U.S.C. § 423(d)(2)(A).[2] All twelve courts of appeals have interpreted this language to mean that a claimant presents a *prima facie* case of disability by demonstrating that he is precluded from returning to his past work by reason of a medically determinable impairment. *See Johnson* v. *Heckler*, 769 F.2d at 1210 (citing cases).[3] Once a claimant demonstrates an inability to return to past work, the burden shifts to the Secretary to show other work that the claimant can perform in light of his age, education, and work experience. Such alternative work experience may be established through the Medical Vocational Guidelines, which take administrative notice of the number of jobs available to persons with designated medical and vocational profiles. *See*

---

2 Even prior to the incorporation of these considerations into the statutory standard of disability, they were reflected in the Secretary's own regulations. *See* 20 C.F.R. § 404.1501(d) (1957); 25 Fed. Reg. 8100 (Aug. 24, 1960). In addition, numerous courts had recognized that an evaluation of ability to engage in substantial gainful activity must account for vocational considerations. *See, e.g., Kerner* v. *Fleming*, 283 F.2d 916, 921 (2d Cir. 1960); *Teeter* v. *Fleming*, 270 F.2d 871, 874 (7th Cir. 1959).

3 Prior to his brief to this Court, Pet. Br. 29 n.15, the Secretary never challenged this rule in any litigation over the severity regulation. *See, e.g., Dixon* v. *Heckler*, 589 F.Supp. at 1506 ("The Secretary does not argue that this Circuit's precedents regarding the allocation of the burden of proof are incorrect. . ."). Indeed, when the term "severity" was first introduced into the Secretary's regulations, the Secretary insisted that "the burden of proof remains as established by the case law and observed by SSA." 43 Fed. Reg. 55359 (Nov. 28, 1978).

20 C.F.R. Pt. 404, Subpt. P, App. 2; *Heckler* v. *Campbell*, 461 U.S. 458 (1983).

Both the Social Security Act's definition of disability and the Secretary's own Medical Vocational Guidelines recognize that the same medical impairment affects persons with different vocational characteristics differently.[4] For example, if a person is limited to sedentary work, he will not be found disabled if he has experience with sedentary jobs or if he is sufficiently young, has sufficient education or sufficient transferable skills to adapt to new sedentary work. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 1. On the other hand, a person who remains capable of lifting as much as fifty pounds will nevertheless be found disabled under the Guidelines if he is closely approaching retirement age, has a marginal education and a history of unskilled work requiring greater exertional abilities. 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 203.01. In essence, the Guidelines "consist of a matrix of the four factors identified by Congress—physical ability, age, education and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Heckler* v. *Campbell*, 461 U.S. at 461-62 (footnotes omitted). These Guidelines show that the question whether someone is disabled by reason of an impairment can rarely be answered merely by looking at the degree of restriction caused by the impairment. Under these Guidelines, the only impairments that will never lead to a finding of disability, regardless of age, education, and work experience, are those which leave the claimant capable of engaging in heavy work and which do not impose non-exertional restrictions.

The severity regulation bypasses this evaluation of ability to return to past work or other work by concluding on the basis

4 *See generally*, Goldhammer, *The Effect of the New Vocational Guidelines on Social Security and Supplemental Security Income Disability Claims*, 32 Ad. L. Rev. 501, 502 (1982).

of medical evidence alone that an impairment is not severe.[5] Every appellate court that has considered the validity of the severity regulation has concluded that this type of denial of benefits on medical facts alone is consistent with the Act only if it is limited to screening out those impairments which are so slight that they would not be disabling regardless of the claimant's age, education and work experience.[6] Those courts which have sustained the regulation have done so only by construing it narrowly to exclude claims where the impairment is so slight that it would not affect the claimant's ability to engage in substantial gainful activity, irrespective of his age, education, and work experience. *See, e.g.*, *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d at 1125; *Salmi* v.

5 It is noteworthy that the Secretary selected a case in which the claimant is relatively young and well-educated to ask this Court to ratify a regulation that excludes consideration of vocational factors. The Secretary chose not to seek review in numerous cases in which the claimants were older, had fewer skills, and marginal educations. It is precisely those persons who are most seriously injured by the severity regulation. *See, e.g.*, *Hansen* v. *Heckler*, 783 F.2d 170, 172 (8th Cir. 1986); *Baeder* v. *Heckler*, 768 F.2d 547, 552 (3d Cir. 1985).

6 *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d at 1125; *Wilson* v. *Secretary of Health and Human Services*, 796 F.2d at 41; *Brown* v. *Heckler*, 786 F.2d 870, 872 (10th Cir. 1986); *Hansen* v. *Heckler*, 783 F.2d at 174; *Yuckert* v. *Heckler*, 774 F.2d 1365, 1369-70 (9th Cir. 1985), *cert. granted sub nom. Bowen* v. *Yuckert*, 54 U.S.L.W. 3753 (May 20, 1986) (No. 85-1409); *Salmi* v. *Secretary of Health and Human Services*, 774 F.2d 685, 691-92 (6th Cir. 1985); *Johnson* v. *Heckler*, 769 F.2d at 1209-13; *Stone* v. *Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985); *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady* v. *Heckler*, 724 F.2d 914, 920 (11th Cir. 1984). The only issue on which the courts of appeals are divided is the relatively minor remedial question whether to insist that SSA construe and apply the severity regulation narrowly in a *de minimis* manner or strike the regulation down, as the court below did, thereby allowing the Secretary to draft a permissible narrow regulation. *Compare Brown* v. *Heckler*, 786 F.2d at 872 ("the only practical way to ensure that the Secretary follows the requirements of the Act is to invalidate the [severity regulation]"), *with Stone* v. *Heckler*, 752 F.2d at 1106 ("we will in the future assume that the ALJ and the Appeals Council have applied an incorrect standard to the severity requirement unless the correct standard is set forth by reference to this opinion, or another of the same effect . . . that [a *de minimis*] construction . . . is used.").

Secretary of Health and Human Services, 774 F.2d at 691-92; *Stone* v. *Heckler*, 752 F.2d at 1101; *Brady* v. *Heckler*, 724 F.2d at 920.[7]

II.

The Secretary's Instructions To His Staff Demonstrate That The Secretary Did Not Implement The Severity Regulation As A *De Minimis* Standard

The Secretary's representation to this Court that he has consistently sought to implement the severity regulation as a *de minimis* screeening mechanism is belied by documents obtained in discovery in litigation over the severity regulation. These documents, show that while the Secretary publicly proclaimed that the severity regulation did not constitute a substantive modification of the former *de minimis* regulation for weeding out frivolous claims, he instructed his staff to apply the new regulation much more strictly. These instructions came in the form of quality assurance returns to disability adjudicators, internal memoranda, internal disability evaluation manuals, internal rulings, "refresher" training courses for administrative law judges and administrative law judge decisions reversed on own motion review by the Appeals Council. A consistent theme throughout these materials is that a disability claimant may be denied benefits on the ground that his impairments are "not severe" even though a medical vocational evaluation might show, or in fact shows, that he is disabled.

7 In so interpreting the severity regulation, these courts have held the Secretary to his public statement in 1978 that the regulation was not intended to alter the standards for determining disability. *See* 43 Fed. Reg. 55358 (Nov. 28, 1978). As amici show below, this public statement of intent was not reflected in internal instructions. Indeed, the Secretary attempted to obtain judicial approval of his stricter severity standard before the Fifth and Sixth Circuits. *See Salmi* v. *Secretary of Health and Human Services*, 774 F.2d at 690; *Stone* v. *Heckler*, 752 F.2d at 1103. Amici therefore agree with the Third Circuit's conclusion in *Wilson* v. *Secretary of Health and Human Services*, 796 F.2d at 41, that in light of the history of the severity regulation and the statistical evidence regarding its application, the better remedial course is to strike down the regulation and leave the Secretary to draft a new acceptable regulation.

A. Quality Assurance Returns

The Secretary began enforcing the severity regulation through internal quality assurance returns two years prior to the regulation's official publication. As one court has observed, the significance of such returns "can hardly be overstated." *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1114 (E.D.N.Y. 1984), *aff'd*, 742 F.2d 729 (2d Cir. 1985), *aff'd sub nom. Bowen* v. *City of New York*, 54 U.S.L.W. 4536 (U.S. June 2, 1986). Such returns "function much like remands do in the court system, and create 'precedents' for determining future cases." *Id.* After being analyzed by the State agency, the returns are "used extensively for the preparation of both training and informational materials." *Id.* They therefore serve as the "best sources of guidance" in determining the standards for disability evaluations. *Id.*

When the Secretary began returning disability determinations under his not yet published severity regulation, numerous state agencies protested that the returns indicated a changed policy that had not yet been incorporated into the regulations.[8] In one such letter, the Director of the New York Bureau of Disability Determinations observed that the "ever increasing returns" suggesting a denial on medical grounds alone appeared to be linked to the Secretary's proposed regulations introducing the term "not severe", and demonstrated that the new language was not merely a technical clarification.[9] In response to this and other protests, Robert Bynum, Associate Commissioner for the Office of Program Operations of the Social Security Administration, sent a memorandum to all Regional Commissioners informing them that the upcoming "not severe" regulation would "clarify" the heightened standard for disallowing disability claims.

8 These documents are included at pages 275-319 of the Joint Appendix in *Bowen* v. *Dixon*, No. 86-2, which has been lodged with this Court. [Hereinafter *Dixon* App.]

9 *Dixon* App. 300.

Copies of quality assurance returns obtained during discovery in *Smith* v. *Bowen*, Civ. No. S-83-1609 (E.D. Cal.) show that the Secretary did not intend that the severity regulation be applied as a *de minimis* screening device.[10] In one California case, for example, the claimant was a 63 year-old woman who had worked as a registered nurse. The claimant was injured in a gardening accident in 1982 and lost four fingers on her right hand. The State agency found that the claimant was disabled based on an evaluation of medical and vocational factors. The quality assurance reviewer reversed this determination and instructed the State to deny the claim as not severe. Ex. 17.[11]

This case illustrates how the Secretary instructed states to apply the severity regulation as more than a *de minimis* requirement. As a registered nurse, the claimant could not perform her past employment because she was no longer capable of substantial lifting or performing duties that require bilateral manual dexterity, handling, or fingering.[12] Turning to the question of other work, the State agency concluded that a sixty-three year old woman who had lost the use of four fingers on her right hand would not be able to adjust to other work that is available in significant numbers in the national economy. The quality reviewers did not question this evaluation, but instead issued the summary verdict that the impairment was not severe.

10 These case returns were obtained during discovery and submitted to the district court. *See* Exhibits Filed With Opposition to Motion to Vacate, *Smith* v. *Bowen*, Civ. No. S-83-1609 (E.D. Cal.) [hereinafter Ex.]. Copies of the returns have been lodged with the Court.

11 The reviewer conceded that the inflammation from the injury was severe, but concluded that this would not last twelve months. Loss of four fingers on the right hand was determined to be not severe.

12 The Secretary takes administrative notice of job descriptions contained in the *Dictionary of Occupational Titles* published by the Labor Department and its companion publication, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (1981). 20 C.F.R. § 404.1566. These publications recognize that a registered nurse must be capable of lifting up to fifty pounds with frequent lifting of up to twenty-five pounds. In addition, these occupations require a capability of handling and fingering.

In another case return produced in the *Smith* discovery, the claimant was a sixty year old lumber yard worker who suffered from degenerative arthritis of the lumbar spine, hypertension, gallstones and peptic ulcer disease. The quality assurance return noted that the consultative examiner had found tenderness over the entire spine and that X-rays indicated evidence of degenerative disease. Based on this evidence, the State was instructed that the claim must be denied as not severe. Ex. 21. This result was mandated even though the claimant's impairments undoubtedly prevented him from resuming his past heavy work as a lumber yard worker. Furthermore, denial of benefits squarely conflicts with the Secretary's own findings under the Medical Vocational Guidelines, that a sixty year old man with an eighth grade education and a history of heavy unskilled labor will not be able to engage in substantial gainful activity available in the national economy if he cannot return to heavy work. 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 203.02.

In a third case, the claimant was a sixty-four year old man who suffered from diabetes and whose right foot had been amputated. The quality reviewers ruled that amputation of the right foot is a not severe impairment because the claimant could be fitted with a prosthetic shoe. They further ruled that the claimant's diabetes was not severe. Because they concluded that the impairment was not severe, they did not assess the claimant's functional capacity or consider his advanced age and apparent lack of any experience in sedentary or light employment. Under the Secretary's Medical Vocational Guidelines a sixty-four year old person who is limited by his impairment to light or sedentary work must be found disabled, absent transferable skills or a recent high school education allowing for direct entry into skilled work. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 2. Nonetheless, the State was instructed to treat the impairment as "not severe" irrespective of vocational considerations. Ex. 11.

In each of these case examples, the claimant suffered from a medically determinable impairment that was objectively verifiable, caused functional restrictions, and was a direct cause of

the claimant's inability to work. To be sure, the claimants' adverse vocational profiles also contributed to their inability to work. Given a younger individual with appropriate skills and education, the inability to perform heavy labor or to perform tasks requiring bilateral manual dexterity and substantial lifting might not preclude substantial gainful activity. But, as the Secretary himself recognizes in the Medical Vocational Guidelines, functional restrictions must be considered in combination with vocational restrictions to determine whether the claimant is able to engage in substantial gainful activity. In each of these cases, the Medical Vocational Guidelines proved to be a mirage. Although the Guidelines take administrative notice, for example, that a person restricted from performing heavy work is disabled given certain vocational characteristics, the Secretary applied the severity regulation to keep claimants who were restricted by their impairments to performing less than heavy work from ever getting to the stage of the administrative process where they could hold the Secretary to his own Guidelines. In short, the severity regulation allows the Secretary to deny benefits summarily even though he has taken administrative notice that a claimant with the specified functional and vocational characteristics is disabled.

B. Internal Manual Instructions

In addition to the quality assurance reviews, the Secretary implemented the severity regulation by requiring, in internal manuals, that certain medically determinable impairments always be considered "not severe".[13] These examples of not severe impairments included some impairments that clearly

13 This list was originally contained in the Disability Insurance State Manual, was expanded in the Program Operations Manual System and was eventually issued as Social Security Ruling ("SSR") 82-55. SSR 82-55 was "obsoleted" in 1985 because it conflicts with the statutory requirement to consider the combined effect of impairments. SSR 85-III-II (April 1985). However, the Secretary has never renounced the case examples contained in SSR 82-55. In fact, recent internal instructions resurrect some of those examples. *See* Program Circular No. 12-85-OD, dated January 14, 1986, a copy of which has been lodged with the Court.

exceeded a *de minimis* test. One example was "osteoarthritis corroborated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints and minimal abnormal findings on physical examination." One SSA regional commissioner commented that this degree of impairment would preclude heavy work.[14] Thus the example was inconsistent with the suggestion that the severity regulation screens out only non-meritorious claims. Similarly, the list of "not severe" impairments included a colostomy with proper functioning of the stoma, even though most surgeons would not permit a return to heavy work following such an operation.[15] Indeed, when the listings of "not severe" impairments were added to the instructional manuals for state disability adjudicators, the Office of Hearings and Appeals formally commented that inclusion of the "not severe" examples would lead to inconsistent adjudications, since the Appeals Council at that time continued to be of the view that no independent severity regulation had ever been properly promulgated, and that, consequently, the pre-existing slightness standard should be applied.[16] Rather than withdrawing the examples, the Secretary issued the same instructions as Social Security Ruling 82-55, so they would be binding on the Office of Hearings and Appeals. The ruling was made effective as of August, 1980.

The Secretary provided further instructions on application of the severity regulation through "refresher" courses for administrative law judges. These courses gave examples of claimants who should be denied as having "not severe" impair-

14 *See* Memorandum from the Regional Commissioner of San Francisco to the Associate Commissioner for Operational Policy and Procedure, dated December 1, 1980, *Dixon* App. 690.

15 *See* Memorandum from Martha McSteen, Regional Commissioner Dallas Region to Associate Commissioner for Operational Policy and Procedure, dated December 10, 1980, *Dixon* App. 700.

16 Memorandum from the Office of Policy and Procedures, Office of Hearings and Appeals, to Office of Disability Programs, Office of Operational Policy and Procedure, dated January 2, 1981, *Dixon* App. 728.

ments. One example is of a woman with a tortuous aorta and documented narrowing of the two coronary arteries.[17] She had been diagnosed as having atypical angina and hypertensive cardiovascular disease with coronary insufficiency. SSA's own consultative physician stated that she should not lift over 25 pounds. On these facts, the "refresher" course stated that the claim should be denied as not severe. Once again, this result squarely conflicts with the Medical Vocational Guidelines which take administrative notice that a person with the described limitations and an adverse vocational profile cannot engage in substantial gainful activity and must be found disabled. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 202.01, 202.02, 202.04, 202.06, 202.09.

III.

Evidence From Jurisdictions In Which The Secretary's Past Policies Are Enjoined Demonstrate That The Severity Regulation Was Not Applied As A *De Minimis* Standard

The Secretary's insistence that the severity standard in effect during the period when respondent's claim was adjudicated was a *de minimis* standard is further contradicted by the experience of class members in *Johnson*, *Smith*, and *Dixon*. In each of these cases, the Secretary chose to comply with the district court's order by issuing instructions barring the use of any severity step.[18] Under these instructions, new cases are being adjudicated without a step two standard. In addition, class members whose claims had been denied at step two were given an opportunity to prove their eligibility through completion of the sequential evaluation.

The experience of the named plaintiffs in these class actions shows that the Secretary has used the severity regulation to

17 *See Dixon* App. 760-62.

18 The Secretary's decision to omit step two in these cases presumably reflected his recognition that he did not have any guidelines for a *de minimis* standard. *See Johnson* v. *Heckler*, 593 F. Supp. at 379 (expressly endorsing application of a *de minimis* test).

deny meritorious claims. Joanne Lockett, one of the named plaintiffs in *Dixon*, was a telephone operator and supervisor prior to suffering a stroke which caused her considerable brain damage. At the initial hearing in her case, the administrative law judge ruled that Lockett was disabled for fourteen months following her stroke but that her impairments were "not severe" as soon as she attempted to learn work skills in a sheltered workshop for disabled persons. The administrative law judge concluded that Lockett could not return to her prior work but stated that this was "not material" since her impairment was "not severe." Accordingly, the administrative law judge did not consider other work Lockett might be able to perform.[19] When Lockett's case was readjudicated under the *Dixon* injunction, the administrative law judge accepted evidence from a vocational counselor which showed that Lockett's impairments prevented her from working. Accordingly, she is now receiving disability benefits.

Gerald Maloney, a named plaintiff in *McDonald*, was also found disabled following a complete evaluation of his disability. Maloney is a sixty year old man who worked for twenty-seven years as an operating room attendant following service in the Army and the Marines.[20] Maloney injured his back and neck while protecting a 175 pound patient from a fall. Despite careful adherence to the therapy prescribed by his doctor, Maloney was unable to return to his former job. Tr. 58. Three months following his accident, Maloney attempted to return to work at the hospital as a mail room clerk. After two weeks, this work also proved to be too strenuous and caused Maloney intense pain. Tr. 60. Maloney's physician reported that X-rays showed "considerable degenerative changes throughout the cervical spine" and that Maloney is "unable to lift more than a few pounds and then only to a level of mid-chest." Tr. 154. At the initial hearing on Maloney's claim, his impairments were

19 *Dixon* App. 76. *See also Dixon* v. *Heckler*, 589 F. Supp. at 1506.

20 *See* Administrative Transcript, filed in *McDonald* v. *Bowen*, No. 84-2109 (D. Mass.) [hereinafter Tr.] at 52, 59.

dismissed as "not severe." Following remand under the *McDonald* order, the administrative law judge concluded that Maloney was "clearly unable to perform his past job as an operating room attendant which required lifting in excess of one hundred pounds." The administrative law judge further found that Maloney was limited to performing sedentary work. Considering Maloney's functional limitations, and his age, education, and work experience, the administrative law judge concluded that Maloney was disabled. This conclusion followed the Secretary's Medical Vocational Guidelines that recognize that a person with Maloney's medical and vocational characteristics and a history of heavy labor, will not be able to adjust to new work that exists in substantial numbers in the national economy.[21]

Statistical evidence from jurisdictions currently enjoined from continuing the Secretary's past policies show that these named plaintiffs' experiences are typical. If, as the Secretary asserts, the severity regulation operated solely to weed out groundless claims, one would expect no change in the percentage of persons found disabled under these injunctions. If, however, the severity regulation operated to deny benefits to eligible claimants, one would expect a greater percentage of persons to be found disabled following consideration of their vocational characteristics.

The most detailed statistics available are from the *Johnson* case, which enjoins use of more than a *de minimis* standard in the State of Illinois. These statistics show that the rate at which claimants are found disabled has risen substantially since the *Johnson* order was put into effect.[22] Prior to issuance of the

21 *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 201.12. A copy of the Administrative Law Judge's decision on remand has been lodged with the court.

22 These statistics are derived from the Secretary's own data, produced in accordance with court ordered compliance reports and discovery. The pre-injunction figures cover the period from January 1984 through November 15, 1985. The post-injunction statistics cover November 15, 1985 through May, 1986.

injunction, 34.3 percent of claimants were found disabled at the initial level. After the injunction, this percentage rose to 52 percent. Similarly, the percentage of claimants allowed at the reconsideration level rose from 14.8 percent to 34.1 percent.

Statistics regarding class members whose cases were readjudicated also provide powerful evidence that the severity regulation was not applied in a *de minimis* manner. Under the injunctions in *Smith* and *Dixon*, class members who had previously been denied as not severe were permitted to obtain a re-evaluation of their disability at the stage of the administrative process where their cases had been decided, or were pending. The statistics on re-evaluations at the administrative law judge level showed that over forty percent of these class members were found disabled even though their claims had previously been denied as not severe.[23] Similar statistics from the *Johnson* class show that 31.2 percent of the claimants re-evaluated at the reconsideration stage were found to be disabled.[24]

23 These statistics are derived from compliance reports prepared by the Secretary pursuant to the orders in *Smith* and *Dixon*. In *Smith*, 44 percent of those class members were found disabled. In *Dixon*, 41 percent were found disabled.

24 In *Smith* and *Dixon*, the percentage of class members found disabled at the reconsideration levels were lower. This appears to result from improper instructions that carried forward the policies enjoined by the district court orders. These instructions were brought to the Secretary's attention in *Dixon*. Proceedings to remedy these instructions are in abeyance pending further discovery.

IV.

Whether The Secretary Is Now Applying A *De Minimis* Severity Standard Is Not Relevant To The Correctness Of The Court Of Appeals' Decision And Should Not Be Addressed By This Court In The Absence Of A Factual Record.

After the court of appeals' decision in this case, the Secretary published two new rulings, SSR 85-28 and SSR 86-8, that the Secretary describes as clarifying the circumstances under which an impairment should be found "not severe."[25] Neither of these rulings was applied to respondent's case. Indeed, SSR 85-28 explains that it is meant to ensure that the Secretary's policy is consistent with "circuit court decisions that have taken issue with the Secretary's *previously stated definition* of 'not severe' impairment." (Emphasis added). It was the previously stated definition—one that every court of appeals has found to have been applied to deny benefits to eligible claimants—which was applied in respondent's case.

Should this Court find these new rulings relevant to the evaluation of the Secretary's regulation, it should not undertake the task of construing them and evaluating the severity regulation in light of that construction. Such review by this Court is inappropriate because the lower court did not pass on the new rulings and because they raise important factual questions, which should not be considered in the first instance by this Court. *See Youakim* v. *Miller*, 425 U.S. 231, 235-36 (1976); *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670, 672-73 (1967).

First, the new rulings do not clearly abandon the Secretary's past practices. Although SSR 85-28 states that it endorses the approach of the *Brady* and *Stone* courts,[26] and employs lan-

25 A draft version of SSR 85-28 was presented to the court of appeals. At the time of the decision below, however, the ruling had not been published. In fact, it was modified prior to its publication.

26 The ruling also purports to follow *Baeder*. This assertion "boldly lifts the Third Circuit's language and quotes it wholly out of context." *Wilson* v. *Heckler*, 622 F.Supp. at 653. *See Bailey* v. *Heckler*, Slip op. at 6-7.

guage similar to that in those decisions, it also asserts that it is merely restating the policy that has always been in place. Thus, it can be read as ratifying the very practices that the circuit courts of appeals have found to conflict with the Act.[27]

Furthermore, the rulings do not clearly abandon the Secretary's prior practice of refusing to consider past work. Although one court has interpreted the rulings as adopting the rule of all twelve circuits that a claimant makes out a *prima facie* case of disability by showing an inability to return to past work, *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d at 1125, the Secretary's brief strongly suggests that the Secretary has no intention of applying the new rulings in this *de minimis* manner. Pet. Br. 29 n.15. Indeed, the Secretary states that he will only consider inability to return to past work when that work was "unique." *See Hansen* v. *Heckler*, 783 F.2d at 175.

In addition, the new rulings raise serious questions about whether the Secretary is abiding by his statutory obligation to follow rulemaking procedures on matters relating to disability. *See* 42 U.S.C. § 421(k)(2); *Pulido* v. *Heckler*, 758 F.2d 503, 506 (10th Cir. 1985).[28] These questions were not addressed by the court below because no new ruling had in fact been promulgated at the time it issued its decision.

27 Furthermore, 86-8 does not reiterate the *Brady de minimis* formulation in describing the severity regulation. Indeed, SSR 86-8 suggests that it might not even be necessary to consider vocational factors in the negative sense that no one with the impairment would be found disabled irrespective of age, education and work experience.

28 As this Court noted in *Heckler* v. *Campbell*, 461 U.S. at 470, formal rulemaking provides an essential procedural safeguard when the Secretary seeks to dispense with individualized adjudication. The Secretary has never submitted his assumptions about the availability of jobs for persons with "not severe" impairments to this process. He suggests that a non-expert can simply guess on a case-by-case basis whether an impairment would prevent any one from engaging in substantial gainful activity, irrespective of age, education, and work experience. Indeed, when the Secretary first considered revising his severity policies, his own workgroup recommended that any revisions be issued through properly promulgated regulations. *See Dixon* App. 622-29.

In light of the many factual and legal issues raised by the new rulings, this Court should not seek to review the new rulings in the first instance. Instead, this task should be left to the lower courts which are in the best position to evaluate all of these issues on the basis of a factual record.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the judgment below remanding respondent's case for a new hearing under an eligibility standard that imposes no more than a *de minimis* threshold test.

Dated: October 6, 1986

BARBARA ELKIN
EPILEPSY FOUNDATION OF AMERICA
4351 Garden City Drive - Suite 406
Landover, MD 20785
(301) 459-3700

ELIZABETH JAMESON
1663 Mission Street
Fifth Floor
San Francisco, CA 94103

KALMAN FINKEL
JOHN E. KIRKLIN
NANCY MORAWETZ
THE LEGAL AID SOCIETY
11 Park Place
Room 1805
New York, NY 10007
(212) 406-0745

ROBERT E. LEHRER
JOSEPH A. ANTOLIN
JOHN BOUMAN
SHELLEY DAVIS
LEGAL ASSISTANCE FOUNDATION OF CHICAGO
343 South Dearborn Street
Chicago, IL 60604
(312) 341-1070

SARAH F. ANDERSON
GREATER BOSTON LEGAL SERVICES
68 Essex Street
Boston, MA 02111
(617) 357-5757

FREDERICK M. STANCZAK
SUSQUEHANNA LEGAL SERVICES
416 Pine Street
Williamsport, PA 17701
(717) 323-8741

RICHARD E. YASKIN
JACOBS & SCHWALBE, P.C.
ASHLAND OFFICE CENTER
Voorhees, NJ 08043
(609) 429-6562

STEPHEN LOFFREDO
WASHINGTON SQUARE LEGAL SERVICES
715 Broadway
New York, NY 10003
(212) 505-7400

STANLEY FREEMAN
WHITE, FINE & VERVILLE
1156 15th Street, N.W.
Washington, D.C. 20036
(202) 659-2900

No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

vs.

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT OF ALABAMA, ALASKA, ARKANSAS, COLORADO, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, VERMONT, WISCONSIN, WYOMING

ROBERT ABRAMS
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
(212) 488-3943

O. PETER SHERWOOD
Solicitor General
Counsel of Record

(Names and addresses of additional Attorneys General are listed infra.)

CHARLES A. GRADDICK
Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

HAROLD M. BROWN
Attorney General
State of Alaska
Department of Law
Box K
Juneau, Alaska 99811

JOHN STEVEN CLARK
Attorney General of the State of Arkansas
201 East Markham Street
Heritage West Building
Little Rock, Arkansas 72201

DUANE WOODARD
Attorney General of the State of Colorado
State Services Building
1525 Sherman Street
Denver, Colorado 80203

JIM SMITH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32301

CORRINE K. A. WATANABE
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

NEIL F. HARTIGAN
Attorney General
State of Illinois
ROMA J. STEWART
Solicitor General
100 West Randolph Street
Chicago, Illinois 60601

LINLEY E. PEARSON
Attorney General of Indiana
219 Statehouse
Indianapolis, Indiana 46204

THOMAS J. MILLER
Attorney General
State of Iowa
Department of Justice
Hoover Building
Des Moines, Iowa 50319

ROBERT T. STEPHAN
Attorney General
State of Kansas
Kansas Judicial Center
Topeka, Kansas 66612

DAVID L. ARMSTRONG
Attorney General
Commonwealth of Kentucky
Capitol Building
Frankfort, Kentucky 40601

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
Louisiana Department of Justice
234 Loyola Avenue, 7th Floor
New Orleans, Louisiana 70112

STEPHEN H. SACHS
Attorney General of Maryland
Munsey Building
Calvert and Fayette Streets
Baltimore, Maryland 21202

FRANK J. KELLEY
Michigan Attorney General
525 West Ottawa Street
Lansing, Michigan 48913

EDWARD LLOYD PITTMAN
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

ROBERT M. SPIRE
Attorney General
State of Nebraska
State Capitol
Lincoln, Nebraska 68509

W. CARY EDWARDS
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

PAUL BARDACKE
Attorney General
State of New Mexico
P.O. Drawer 1508
Bataan Memorial Building
Santa Fe, New Mexico 87504

LACY H. THORNBURG
Attorney General
State of North Carolina
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505

ANTHONY J. CELEBREZZE, JR.
Attorney General for the State of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266

MICHAEL C. TURPEN
Attorney General
State of Oklahoma
State Capitol
Oklahoma City, Oklahoma 73105

LEROY S. ZIMMERMAN
Attorney General
Commonwealth of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, Pennsylvania 17120

MARK V. MEIERHENRY
Attorney General
State of South Dakota
State Capitol
Pierre, South Dakota 57501

State of Texas
JIM MATTOX
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711

JEFFREY L. AMESTOY
Attorney General
State of Vermont
Pavilion Building
Montpelier, Vermont 05602

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707

A. G. MCCLINTOCK
Attorney General
The State of Wyoming
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

vs.

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE *AMICI CURIAE* STATES IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE* STATES

The interest of the *amici* States* arises in part from their statutory and contractual duties to determine in the first instance whether claimants are disabled for purposes of evaluating their initial and continuing eligibility for Social Security Disability ["SSD"] and Supplemental Security Income ["SSI"] benefits. 42 U.S.C §§ 421(a)(1) (SSD); 1383b(a) (SSI); 20 C.F.R. §§ 404.1601, *et seq.*; 416.1001, *et seq.* Pursuant to federal law, the State Disability

* The *amici* States file this *Amici Curiae* Brief pursuant to Supreme Court Rule 36.4 which provides for filing such a brief without consent of the parties.

Determination Services ["DDSs"] must apply all applicable federal statutes and regulations as well as all unpublished internal Social Security Administration ["SSA"] rules, program circulars, manuals, informational digests, etc. [hereafter "standards"] in making those determinations. 42 U.S.C. §§ 421(a)(1), 421(b). Failure to comply with SSA's standards can result in the imposition of severe financial sanctions against the DDSs or the assumption of administrative control of the programs by SSA. 42 U.S.C. §§ 421(b)(1); 421(c)(1); 421(c)(3)(C). As a result of legislation enacted in 1984, these harsh penalties can now be imposed as early as 180 days after a finding by SSA of State non-compliance.[1] The harshness of these penalties highlights the importance of SSA's promulgating standards that are clear, complete, and in compliance with the Social Security Act.

SSA's argument is based on its contention that in applying the threshold severity regulations involved herein, it has consistently utilized a *de minimis* standard and thus has screened out only those claimants whose impairments were so slight that they could never be found disabled. Petitioner's Brief at 13, 16, 29, 35. A major purpose of this brief is to demonstrate that this contention is false. Since mid-1976, through increased case returns in the Quality Assurance program, various unpublished internal rules and, later, federal regulations, SSA applied and required the State DDSs to apply a much stricter standard even though the statute remained unchanged. Because of the central role they play in the administration of the federal disability programs, the *amici* States which, together, are responsible for processing approximately 62% of the total applications for SSD and SSI benefits nationally,[2] were in the best position to learn of SSA's adoption of this improper severity standard. Thus, they are uniquely qualified to explain to this Court what that standard entailed and why it has exceeded a *de minimis* standard.[2]

---

[1] Social Security Disability Benefits Reform Act of 1984, P.L. No. 98-460, § 17(b)(1)(D)(i), codified as 42 U.S.C. § 421(b)(1).

[2] SSA Statistics, (June, 1986).

The *amici* States have a particularly strong interest in assuring that this Court recognizes the true nature of SSA's severity policy, as its imposition has placed the States in an untenable position: either they applied the severity standard that many believed, and which courts have found, to violate the Social Security Act or they refused to do so and risked SSA's imposition of harsh sanctions. Only if this Court affirms the appellate court's decision will the States again be permitted to make proper assessments of claimants' disability as intended by Congress.

The *amici* States also file this brief because of the tremendous human and financial costs that have been imposed by SSA's adoption and application of the improper severity standard. As is discussed more fully below, a primary congressional purpose in establishing the SSD and SSI programs was to relieve States and local governmental entities of the costs of providing public assistance to disabled persons. SSA's application of the improper severity standard has frustrated this purpose, as it has resulted and will continue to result in improper denials and terminations of benefits for tens of thousands of truly disabled persons. Because they are disabled, many of these persons have no other source of income. The denial or termination of SSD and SSI benefits has thus forced them to seek public assistance from State and local governmental entities in order to secure shelter, food, medical care and other basic necessities of life. The resulting increase in costs to the States and localities, directly contrary to congressional intent, will continue until this Court prohibits SSA from applying a threshold severity standard which has more than a *de minimis* impact.

SUMMARY OF THE ARGUMENT

The central issue before this Court is whether the threshold severity test adopted and applied by SSA since mid-1976 is a *de minimis* one, the only threshold standard permitted by the Social Security Act. Prior to 1976, SSA complied with the Act by applying a "slightness" standard pursuant to which only those persons who had an impairment(s) so minimal as not to preclude

any type of work activity were denied or terminated from disability benefits on medical grounds alone without full consideration of their age, education and work experience ["vocational factors"]. However, it has been the States' experience that, since mid-1976, SSA has imposed a threshold severity test that has exceeded a *de minimis* standard, thereby precluding proper disability adjudications and preventing claimants who are unable to return to their former employment due to an impairment from proving that they are too disabled to engage in other work.

SSA first imposed the new severity standard through its Quality Assurance program and unpublished internal policy statements wherein SSA broadened the definition of "slight" impairment to include increasingly disabling conditions, without reference to their impact on the individual claimant. Subsequently, although the Social Security Act was not amended in any relevant respect, SSA published regulations requiring applications for disability benefits to be denied on medical grounds alone as "not severe" unless the claimant's impairment(s) "... significantly limit the individual's physical or mental capacity to perform basic work-related functions." 20 C.F.R. §§ 416.920(c), 416.921, 404.1520(c), 404.1521 as published in 43 Fed. Reg. 55349 (Nov. 28, 1978).

Together, these substantial policy changes resulted in the imposition of far more than a *de minimis* threshold standard, a fact recognized by various State DDS and SSA officials. The impact of these changes was dramatic: the percentage of disability claimants denied on the ground that their impairments were "non-severe" increased more than five-fold from 8.4% of all SSD applications in 1975 to 43.2% in 1981.[3]

Despite its representations to the contrary, SSA has applied this severity standard at all levels of the adjudicatory process, with the result that hundreds of thousands of claimants were not accorded a full disability evaluation with consideration of the

[3] *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 1986 Ed., House Comm. on Ways and Means, 99th Cong., 2d Sess. 114 (Mar. 3, 1986) [hereafter *1986 Background Materials*].

claimant's vocational factors as intended by Congress. Even if these persons were too disabled to return to their prior employment, SSA's new severity standard prevented them from showing that they also could not perform other work in the economy. As a result of this threshold severity standard, many claimants were improperiy found to be ineligible for SSD or SSI disability benefits on the ground that their impairments were "non-severe."

Because SSA's severity standard exceeded a *de minimis* test, numerous federal appellate courts have either invalidated SSA's threshold regulations or re-interpreted them to embody a *de minimis* standard. SSA has recently attempted to return to its prior slightness standard by issuing unpublished internal rulings. But the new rulings are ambiguous, particularly when read in conjunction with the unchanged published severity regulations. In light of SSA's prolonged application of the improper standard and the severity policy's continuing adverse impact on claimants, especially those 55 years of age and older, the ambiguities in the new rulings reveal the need for the Court to affirm the ruling below, in effect requiring SSA to modify the regulations. Only if this occurs will there be an end to SSA's use of confused, sometimes illegal, and frequently contradictory internal interpretations.

ARGUMENT

I. THE SOCIAL SECURITY ACT PROHIBITS THE SOCIAL SECURITY ADMINISTRATION FROM IMPOSING MORE THAN A *DE MINIMIS* THRESHOLD STANDARD UPON CLAIMANTS FOR SOCIAL SECURITY DISABILITY OR SSI DISABILITY BENEFITS.

A. The Social Security Act

Since establishment of the SSD and SSI programs in 1954 and 1974, respectively, the Social Security Act has defined disability for both programs in terms of the claimant's vocational factors,

medical impairments, the impairments' duration, and the functional restrictions imposed by them.[4] Further, Congress intended that no one factor be considered to the exclusion of the others, as evidenced by the legislative history that medical and vocational factors be considered in all disability adjudications.[5] Accordingly, SSA and DDSs are required to evaluate each claim in terms of the individual's ability to engage in past or other work. Further, as every federal appellate court has ruled, once a claimant shows that he or she is unable to return to prior employment because of a medical impairment, the burden shifts to the Secretary to identify other work in the national economy which the individual can perform.[6]

This Court has ruled that SSA regulations directing specified disability adjudications are valid only to the extent that they take administrative notice of certain facts which would otherwise have to be proven by repetitious testimony. *Campbell v. Heckler*, 461 U.S. 458, 467 (1983) (upholding SSA's medical-vocational guidelines). Following this reasoning, every federal appellate court considering the issue has ruled that, as SSA admits in its Petition at 23-24, the Act permits SSA to impose a *de minimis* threshold standard only if that test screens out only those cases in which the claimant's impairments are so minimal that no set of vocational factors, even if fully considered, could ever result in a

[4] 42 U.S.C. §§ 423(d); 1383c(a)(3).

[5] *See e.g.*, S. Rep. No. 1987, 83rd Cong., 2d Sess. (1954), *reprinted in* 1354 U.S. Code Cong. & Admin. News 3710, 3730; S. Rep. No. 744, 90th Cong., 1st Sess. 43 (1967), *reprinted in* 1967 U.S. Code Cong. & Admin. News 2834, 2880, 2883, cited in *Baeder v. Heckler*, 768 F.2d 547, 551 (3d Cir. 1985).

[6] *Francis v. Heckler*, 749 F.2d 1562, 1564 (11th Cir. 1985); *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984); *Hall v. Secretary of Health, Educ. and Welfare*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Smith v. Califano*, 592 F.2d 1235, 1236–37 (4th Cir. 1979); *O'Banner v. Secretary of Health, Educ. and Welfare*, 587 F.2d 321, 323 (6th Cir. 1978); *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978); *Lewis v. Weinberger*, 515 F.2d 584, 587 (5th Cir. 1975); *Stark v. Weinberger*, 497 F.2d 1092, 1097–98 (7th Cir. 1974); *Hernandez v. Weinberger*, 493 F.2d 1120, 1123 (1st Cir. 1974); *Garrett v. Richardson*, 471 F.2d 598, 603–04 (8th Cir. 1972); *Meneses v. Secretary of Health, Educ. and Welfare*, 442 F.2d 803, 807 (D.C. Cir. 1971); *Choratch v. Finch*, 438 F.2d 342, 343 (3d Cir. 1971).

finding of disability.[7] Such a *de minimis* threshold standard would preclude the need for a full consideration of vocational factors while not denying benefits to those claimants who meet the Act's definition of disability.

B. *Before 1976, SSA Complied with the Act by Applying a* De Minimis *Threshold Standard.*

Prior to 1976, as a matter of policy and practice, SSA applied a *de minimis* standard in compliance with the Act. SSA's published regulations required that all claimants with a medically determinable impairment (whether or not "severe") receive a complete assessment including consideration of medical and vocational factors. 20 C.F.R. § 404.1502(a)(1968). The only relevant exception to this full evaluation requirement, *i.e.*, the only cases in which denials or terminations could be made on medical considerations alone, were those in which the claimant had only a "slight" impairment. *Id.*[8]

SSA's slightness regulations constituted no more than a *de minimis* threshold standard because they defined "slight" to involve "...only a slight departure from a normal condition." 20 C.F.R. §§ 404.1502(a), 416.902(a). *See also* SSA Disability

[7] *McDonald v. Secretary of Health and Human Services*, 795 F.2d 1118 (1st Cir. 1986); *Wilson v. Secretary of Health and Human Services*, 796 F.2d 36 (3d Cir. 1986); *Brown v. Heckler*, 786 F.2d 870 (8th Cir. 1986); *Dixon v. Heckler*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986)(No. 86-2); *Hansen v. Heckler*, 783 F.2d 170 (10th Cir. 1986); *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1985); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685 (6th Cir. 1985); *Johnson v. Heckler*, 769 F.2d 1202 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (U.S. Feb. 27, 1986)(No. 85-1442); *Stone v. Heckler*, 752 F.2d 1099 (5th Cir. 1985); *Evans v. Heckler*, 734 F.2d 1012 (4th Cir. 1984); *Brady v. Heckler*, 724 F.2d 914 (11th Cir. 1984).

[8] The other exceptions, not relevant to this case, permitted denial or termination of benefits without full assessment where the claimant was engaged in substantial gainful activity and when the impairment was not expected to last more than twelve months. 20 C.F.R. §§ 404.1502(a), 416.902(a).

Insurance State Manual § 321.B (Exhibit A).[9] Those regulations deemed the following examples of impairments to be slight: "slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities." *Id.* The use of the term "slight," the emphasis of SSA's published regulations on minimal impairment and the nature of the examples cited, were all clear indications to the State DDSs that SSA's policy was that very few and only the most minor impairments were to be determined "slight."

SSA's day-to-day practice was consistent with its written policies. The vast majority of claimants were found to have impairments which exceeded the *de minimis* threshold standard. Indeed, in 1975, more than 90% of all SSD claimants passed this threshold test[10] and received a determination that was based at least in part on an evaluation of their ability to perform past or other work.[11] In its pre-1976 reviews of samples of State DDS decisions for compliance with SSA's policies, made pursuant to 42 U.S.C. §§ 421(b)(1) and 421(c)(2), (3), SSA rarely ruled that a

---

[9] All exhibits referenced herein appear in the *amici* States' Appendix, copies of which have been lodged with the Court. Most of these documents also appear in the Joint Appendix in *Dixon v. Heckler*, 785 F.2d at 1102 (a copy of which has been lodged with the Court with the Respondents' Brief in Opposition to Certiorari in that case) and are referenced by "DJA" followed by page numbers.

The Court can take judicial notice of these documents pursuant to Federal Rules of Evidence Rule 201(b)(2), (f), as it has taken notice of other documents and information submitted by *amici curiae*. *Regents of University of California v. Bakke*, 438 U.S. 265, 316-17, 321-24 (1978); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 56-7, n. 111 (1973). *See also Papasan v. Allain*, 106 S. Ct. 2932, 2935, n.1 (1986) (The Court can consider undisputed items in the "public record"); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036 (1978).

[10] *1986 Background Materials* at 114.

[11] In those years, only 47% of the claimants who passed this threshold test were found eligible at the later steps. *Staff Data and Materials Related to the Social Security Disability Insurance Program*, Senate Finance Comm., 97th Cong., 2d Sess. 21 (Aug., 1982).

claim which had been allowed should have been denied on grounds that the impairment was "slight." This is additional proof that SSA's policy permitted only those impairments which had the most minimal impact on a claimant's functional ability to be deemed "slight" and constitute a basis for denying or terminating benefits on medical grounds alone.

II. BEGINNING IN 1976, SSA BEGAN IMPOSING A THRESHOLD TEST FOR DISABILITY BENEFITS THAT EXCEEDED A *DE MINIMIS* STANDARD, THEREBY UNLAWFULLY DEPRIVING CLAIMANTS OF A FAIR OPPORTUNITY TO PROVE THEIR ELIGIBILITY FOR BENEFITS.

A. *SSA Imposed Its New Severity Standard Through Its Quality Assurance Program and Unpublished Internal Rules and Later Through its Regulations.*

1. SSA Broadened the Definition of "Slight" Impairment to Include Increasingly Disabling Conditions Without Reference to their Impact on Individual Claimants.

Although the relevant sections of both the Act and, until 1979, SSA's published regulations, remained unchanged, the federal agency began in 1976 to implement substantial policy changes which would cause the denial and termination of benefits to hundreds of thousands of persons without a proper assessment of disability. First, SSA began requiring that impairments imposing greater than slight limitations now be deemed "slight." This change was initially implemented not through publication of federal regulations with public notice or opportunity for comment, or even by internal written instructions, but rather through SSA's Quality Assurance process. Whereas SSA had been approving virtually all State DDS determinations regarding the severity of claimants' impairments, in mid-1976 SSA began returning a number of cases in which benefits had been allowed after

consideration of medical and vocational factors.[12] SSA's instructions accompanying the returned cases directed that the claimants' impairments be found to be "slight" and that benefits be denied or terminated without consideration of vocational factors.[13]

These returns involved impairments of a far different character than the three types of disabilities listed as "slight" in the published federal regulations. *See* Section I.B., *supra*. For example, SSA

[12] DDSs must necessarily place great significance on Quality Assistance case returns as they can reveal new SSA policies which the State agencies must apply to avoid imposition of sanctions. *See City of New York v. Heckler*, 578 F. Supp. 1109, 1115-16 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd*, 106 S.Ct. 2022 (1986); *Minnesota Mental Health Assoc. v. Schweiker*, 554 F. Supp. 157, 163 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983); *Social Security Disability Insurance: Hearing Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 98th Cong., 1st Sess. (June 30, 1983) [hereafter *June 30, 1983 House Ways and Means Comm. Hearing*] at 126 (Statement of Peter J. McGough, Associate Director, Human Resources Division, United States General Accounting Office).

[13] In December, 1976, the Director of the New York State DDS wrote to SSA that:

> [O]ur staff as well as staff in other State agencies have been expressing concern over the ever increasing returns of cases with suggestions that a denial based on slight impairment is appropriate. We have had difficulty in relating these individual cases to current Regulations and the provisions in the State Manual.

Letter from Sidney Houben, Director, New York State DDS, to Elmer Smith, Associate Commissioner of the Office of Program Policy and Planning of SSA, dated December 27, 1976 at 1-2 [hereafter *Houben Letter dated December 27, 1976*](Exhibit B, DJA 300-301). Mr. Houben also recognized that the increased case returns were a result of SSA's concurrent adoption of the new severity standard (*See* Section II.A.2, *infra*):

> The proposed changes in the regulations make it clearer as to why these returns have been forthcoming and we believe this supports our feeling that this change is more than a technical clarification of language.

directed the New York DDS to find the loss of an eye, hypertension, and colostomy to be "slight" impairments. This policy change was eventually reduced to writing in December, 1978 when SSA issued a list of impairments which were to be considered "non-severe:"

> (1) loss of one eye or loss of vision in one eye; (2) essential hypertension with no evidence of retinal exudates, hemorrhage or papilledema; congestive heart failure, renal dysfuntion; or neurological residuals of cerebrovascular accident; (3) colostomy, uncomplicated, with proper function of the stoma; (4) epilepsy, with no major motor seizures for 12 months or more; (5) I.Q. of 80 to 90 in all major areas of intellectual functioning.

SSA Disability Insurance State Manual § 321.B. (Exhibit A). This list was expanded, through issuance of Program Operations Manual System ["POMS"] DI § 2107.C in 1981 and SSA Ruling 82-55 in 1982,[14] to include twenty examples of impairments which were to be found "non-severe." Examples of the listed conditions were: osteoarthritis, excision of lumbar disc, obstructive airway disease, and epilepsy. *Id.*

Clearly, the impairments included in these listings are of far greater severity than those described in the pre-1976 listing of "slight" impairments and in many instances impose more than minimal restrictions. For example, the "loss of one eye," which necessarily impairs depth perception and peripheral vision, is far more serious an impairment than "slight vision impairment."

[14] SSA Rulings constitute policy with which SSA Administrative Law Judges and the SSA Appeals Council must comply, as well as the State DDSs. 20 C.F.R. § 422.408.

As with the initial list issued in 1978, this expanded list of "non-severe" impairments was never published in the Federal Register for public comment as required by 7 U.S.C. § 553, despite requests from SSA's own personnel. *See* Memorandum from Martha A. McSteen, Regional Commissioner for the Dallas Regional SSA Office, to SSA Associate Commissioner for Operational Policy and Procedures, dated December 10, 1980 at 1 [hereafter *1980 McSteen Memorandum*] (Exhibit C, DJA 699).

Similarly, a gastrointestinal impairment requiring surgery such as a colostomy, is much more serious than a mere "abnormality," particularly if the colostomy was due to a chronic illness such as ileitis. Even SSA personnel objected that some of the impairments should be deemed severe.[15] Yet, by 1978, SSA's internal rules required the States to deny and terminate benefits to persons with these conditions on medical grounds alone. Necessarily, many more cases were denied and terminated without consideration of the claimant's vocational factors or functional limitations.

In addition to being medically incorrect, SSA's attempts to generalize about specific impairments without consideration of each claimant's actual functional limitations was, for several reasons, practically impossible to apply. SSA's listings failed to recognize that medical impairments can affect different persons differently. For example, a physician might well advise a person who had had a colostomy or disc surgery not to engage in medium lifting or repeated bending.[16] Indeed, it is medically impossible to lump all claimants who are suffering from a particular impairment into one group, irrespective of age, physical build, and residual capacity to lift, stand, bend, carry weights, and state that none of them have a severe impairment. However, the federal standards required exactly that.

In addition, SSA's expanded lists of non-disabling impairments fail to recognize that even though two claimants may have the same impairment, differing vocational factors can mean that one will be able to work and the other will not. By pre-empting

[15] In her comments on the proposed draft of the expanded listing, the SSA Regional Commissioner for the San Francisco Region protested that osteoarthritis with minimal findings and hypertension with a CVA (even without neurological residuals) should be considered severe impairments. Memorandum from Jane Presley, Regional Commissioner for the SSA Regional Office for San Francisco, to SSA Associate Commissioner for Operational Policy and Procedures, dated December 1, 1980 at 1 (Exhibit D, DJA 690).

[16] *See* 1980 McSteen Memorandum at 1 (Exhibit C, DJA 699).

consideration of these factors, the severity standard precluded proper evaluations of claimants' ability to work in a substantial number of cases.[17]

2. Concurrently, SSA Adopted a Policy Requiring that Impairments be "Severe" in Order to Warrant a Full Evaluation of Disability.

Although the relevant provisions of the Social Security Act have not been amended, in June, 1976, SSA issued the following proposed regulatory change to the State DDSs:

> . . . medical considerations alone can justify a finding that the individual is not under a disability where the impairment is not severe, that is where the impairment does not significantly limit the individual's physical or mental capacity to perform basic work related functions.[18]

[17] *See* Section II.C., *infra*, for statistics showing the dramatic increase in the number of disability claims denied for lack of a severe impairment subsequent to the change in SSA's policy.

[18] Memorandum from Robert P. Bynum, SSA Associate Commissioner of the Office of Program Operations, to SSA Regional Commissioner for the Dallas Region, dated June 8, 1976 at 2 [hereafter *June 8, 1976 Bynum Memorandum*] (Exhibit E, DJA 314). A copy of this Memorandum was distributed as SSA policy to all State DDSs (along with the document marked as Exhibit J) through inclusion in SSA's *Compendium of Policy and Procedural Guidance Memoranda Prepared by the Bureau of Disability Insurance*. The Compendium included copies of memoranda prepared by SSA to explain, clarify or amplify disability policy or procedural concepts. While the preface to the Compendium indicated that the memoranda were not official instructions, it did specify that the memoranda were to be used by operations personnel for background and reference. Another notice to all DDSs stated that the volume included copies of "selected *policy statements*." [Emphasis added.] The Compendium has since been superseded by other SSA guidelines which incorporate the policies therein.

The language of the proposed regulation was included in a letter from Sidney Houben, Director, New York State DDS, to Henry Riley, SSA Regional Representative for the New York Region, dated December 23, 1976 at 1 [hereafter *Houben Letter dated December 23, 1976*] (Exhibit F, DJA 298).

At the same time, the new policy also appeared in other internal SSA documents,[19] announcements, and training materials[20] which the State DDSs were required to apply in order to avoid imposition of the severe financial and administrative sanctions discussed above. However, not until more than two years after it had implemented the new severity threshold requirement did SSA incorporate this policy in revised regulations,[21] which were effective February 28, 1979. The new regulations provided:

> Medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe. A medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions.

20 C.F.R. §§ 404.1520(c); 416.920(c).

In several respects, SSA's new severity policy constituted a substantial departure from the agency's prior policy. The major change is the substitution of the "non-severe" threshold standard for the prior "slight" standard, thereby imposing more than a *de minimis* standard. *See* Section II.B., *infra*. Second, the revised federal regulations require that a claimant's impairment be

[19] Memorandum from Robert P. Bynum, SSA Associate Commissioner for Office of Program Operations, to SSA Regional Commissioner for the Chicago Region, dated December 27, 1976 at 1 (Exhibit G, DJA 649). A copy of this Memorandum was distributed to all Regional Commissioners by Memorandum from Mr. Bynum dated January 14, 1977 (Exhibit H, DJA 648).

[20] The new severity standard was discussed by SSA Central Office staff at a December 8, 1976 meeting in Baltimore attended by State DDS staff and included in background materials prepared for that meeting. *See* Houben Letter dated December 23, 1976 at 1 (Exhibit F, DJA 298).

[21] 43 Fed. Reg. 55349 (Nov. 28, 1978). The regulation had been published in proposed form earlier in the year. 43 Fed. Reg. 9303 (Mar. 7, 1978).

judged, not on the medical grounds of whether it constitutes a minimal deviation from the individual's normal physical or mental condition, but rather by whether it "significantly" interferes with "most basic work activities" as performed by the average individual. Further, the regulations do not define the term, "most basic work activities," nor what exertion or sustained capacity to perform individual work activities such as lifting, standing, bending, and carrying weights is required to meet this test.

Most troubling, the severity test revealed that SSA's new policy and practice was to deny and terminate claims on medical grounds alone even though the claimant was so impaired that he or she could not return to prior employment. This policy was imposed on the States as early as June, 1976, *see* June 8, 1976 Bynum Memorandum at 1 (Exhibit E, DJA 313), and made binding on the ALJs and the Appeals Council in SSA Ruling 82-56.[22] That Ruling, effective retroactively to August 20, 1980, states in relevant part:

> A finding of ability to engage in SGA may be justified on the basis of medical considerations alone when the degree of a medically determinable impairment is found to be not severe. A not severe impairment may consist of one or more separate conditions that do not significantly limit the individual's physical or mental capacity to perform basic work-related functions.
>
> Performance of basic work-related functions involves a capacity for sitting, standing, walking, lifting, pushing, pulling, handling, seeing, hearing, communicating, and understanding and following simple instructions. When there is no significant limitation in the ability to perform these types of basic work-related functions, *an impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past.*

[22] SSA Ruling 82-56 was never published in the Federal Register with the required opportunity for public comment.

SSR 82-56 at 112 (Emphasis added). SSR 82-56 directly contradicted the Act's requirement of full disability evaluation for all claimants who suffer from more than a slight impairment. More specifically, SSA Ruling 82-56 prevented claimants from even showing that they could not return to their prior work, and so violated those court rulings specifying that the burden of proof shifts to the Secretary upon such a *prima facie* showing. *See Smith v. Heckler*, 595 F. Supp. 1173, 1179 (E.D. Ca. 1984). Persons unable to do their past work clearly have more than minimal impairments; yet SSA Ruling 82-56 prevented the State DDSs from conducting a full disability evaluation including consideration of vocational factors in these cases. SSA's policy had an adverse effect on all claimants but especially on those age 55 and older, for whom SSA's medical-vocational guidelines would otherwise direct a finding of disability on the basis of their age, education and work experience once they had shown they were unable to return to their prior employment.[23]

B. *The State Disability Agencies and Even SSA Itself Recognized that the New Threshold Standard Exceeded a* De Minimis *Test.*

Various State DDS administrators, as well as SSA's own staff, strongly objected to SSA's use of an increased threshold standard which denied benefits to persons who were unable to perform their prior work and were otherwise unable to engage in substantial gainful employment. In one such protest, the Director of the New York State DDS asserted, prior to amendment of the regulations, that SSA's implementation of the new severity standard would:

> ... confuse our staff. We believe that it is a more restrictive definition and will result in claims being denied

[23] *See Dixon v. Heckler*, 589 F. Supp. 1491, 1508 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (U.S. July 2, 1986) (No. 86-2). *See also* Memorandum from Leader, "Not Severe" Impairment Workgroup to SSA Acting Deputy to the Deputy Commissioner for Programs and Policy Re: Final Report and Recommendations of Workgroup - DECISION, dated August 23, 1983 [hereafter *'Not Severe' Impairment Workgroup Report*] at 11 (Exhibit I, DJA 620).

> because vocational factors were not considered along with medical evidence.[24]

In another letter, he protested that the substitution of "non-severe" for "slight" was "an amendment to the current Regulation..." and went on to object that:

> Although the panel at the public meeting as well as the background statement for the meeting characterized this change as a 'technical clarification of language', we believe that a change in definition is involved. This change will result in a substantially larger percentage of claims which are automatically denied based on medical considerations alone. Thus, claimants who currently are afforded an opportunity for consideration of non-medical factors will no longer receive such treatment.

Houben Letter dated December 27, 1976 at 1 (Exhibit B, DJA 300). Other State DDSs, including those in California and New Mexico, also questioned the increased severity threshold standard in communications with SSA and responses to congressional inquiries.[25]

While SSA staff denied that a policy change had occurred, characterizing it as a mere "technical clarification,"[26] SSA's own staff quickly recognized the substantial policy change it represented. They protested that imposition of SSA's threshold

[24] Houben Letter dated December 23, 1976 at 1-2 (Exhibit F, DJA 298-99).

[25] *See, e.g.*, Memorandum from Martha A. McSteen, Regional Commissioner for the Bureau of Disability Insurance for the Dallas Regional SSA Office, to Robert P. Bynum, SSA Associate Commissioner for the Office of Program Operations, dated March 29, 1976 at 1 [hereafter *1976 McSteen Memorandum*] (Exhibit J, DJA 309). From 1982 until 1986, Mrs. McSteen was Acting Commissioner of SSA. *See also Actuarial Condition of Disability Insurance—1978*, Subcomm. on Social Security of the House Ways and Means Comm., 96th Cong., 1st Sess. 14—17 (Feb. 1, 1979).

[26] 43 Fed. Reg. 9296 (Mar. 7, 1978). *See also* 43 Fed. Reg. 55358 (Nov. 28, 1978).

severity standard was inconsistent with the published policy and would have the effect of precluding full disability assessments in a substantial number of cases. The SSA Regional Commissioner for New York wrote a letter to the SSA Central Office stating:

> The DDSs have been questioning us with increasing frequency about the issue of what constitutes a 'slight' impairment. Based on feedback from BDI quality reviews, we must share their concern. Existing DISM guidelines are being interpreted more broadly by C/O reviewing staff in various case-related situations, as well as in general publications such as the new DOM XV on Quality Assurance.[27]

He went on to object to SSA's policy under which a claimant with epilepsy who is restricted from driving, working at heights or using sharp tools has only a "slight" impairment.[28]

Noting "a growing concern over the high incidence of not severe denials at initial and reconsideration," the SSA Regional Commissioner for the Dallas Region objected to the vagueness of the new standard. 1980 McSteen Memorandum at 1 (Exhibit C, DJA 699). She also stated her concern that use of different policies (a "slightness" policy by States and a "severity" policy by the federal Quality Assurance reviewers), would lead to more case returns to State DDSs and the formulation of SSA policy through the QA process. *Id.*

When SSA published the proposed severity regulations in 1978, SSA's highest adjudicative branch, the SSA Appeals Council, objected that those regulations established a heightened standard that was inconsistent with SSA's public statement that it did not

---

[27] Memorandum from Joseph J. Kelly, SSA Regional Commissioner for New York, to SSA Associate Commissioner for the Office of Program Operations, dated January 4, 1976 at 1 (Exhibit K, DJA 303).

[28] *Id.* at 2.

intend to modify its prior slightness standard.[29] In 1981, the Council reiterated its position that the slightness standard it utilized was inconsistent with SSA's new severity standard and requested that the matter be dealt with before SSA issued a new listing of "non-severe" impairments.[30]

Other SSA personnel specifically objected to the fact that the new threshold severity standard permitted denial and termination of benefits in cases where the claimant could not return to his or her former employment:

> It is inconsistent almost to the point of being ridiculous to characterize any impairment which prevents an individual from doing his customary work, no matter the unique character of that work, as 'slight' in the context of that individual's particular cases, if in fact, it is 'the primary reason for the individual's unemployment.'[31]

Even the Secretary of HHS has since admitted that the application of the threshold severity standard constituted a policy change. On August 23, 1983, a SSA workgroup issued an internal report on the severity regulations. That report stated:

> Whatever SSA's actual conception of the minimum impairment level was for policy purposes between 1975 and the present, its *application* of the concept in deciding cases suggests a change of position. Yet, at the same time, there was no corresponding change in the Statute and, in fact, SSA itself stated that the regulations did not constitute a change of standard.[32]

---

[29] Memorandum from SSA Appeals Council to SSA Office of Policy and Procedure Re: Recodification of Regulations on Determining Disability and Blindness, dated August 8, 1979 at 2 (Exhibit L, DJA 667).

[30] Memorandum from Jacob M. Wolf, Acting Director, Office of Policy and Procedures in the SSA Office of Hearings and Appeals, to Office of Disability Programs in the SSA Office of Operational Policy and Procedures, dated January 2, 1981 at 3 (Exhibit M, DJA 728).

[31] 1976 McSteen Memorandum at 2 (Exhibit J, DJA 310).

[32] "Not Severe" Impairment Workgroup Report at 11 (Exhibit I, DJA 620).

These contemporaneous admissions by SSA officials that the severity standard exceeded a *de minimis* test reveal the fallacy of the agency's recent statements that it has never applied more than a "slightness" standard or that the improper severity standard did not have a massive adverse impact on disability claimants. *See* SSA Ruling 85-28; n. 50, *infra*.

C. *SSA's Implementation of Its New Threshold Standard Led to a Substantial Increase in the Percentage of Claimants Denied Benefits Without a Full Evaluation of Whether They Could Do Substantial Gainful Work in Light of Their Vocational Factors.*

That SSA's severity standard exceeded a *de minimis* standard was just as clearly shown by the dramatic increase in the number of SSD and SSI cases denied without consideration of vocational factors, on the basis that the claimant did not suffer a severe impairment. Prior to 1976, the percentage of claimants denied on the grounds of "slight" impairment was very low: only 8.4% of SSD claims were denied as "slight."[33]

As a result of SSA's imposition of the new severity standard, the percentage of cases denied on the basis of "slight" impairment skyrocketed. The following statistics reveal the magnitude of SSA's change in policy:

---

[33] *1986 Background Materials* at 114. In addition, one SSA official noted that,

> ... a Dallas study of more than 2500 CRS reviewed cases strongly suggested, on the basis of internal inconsistencies between the basis code, diagnoses, and rationale, that fewer than 3% of SSI claims are correctly denied on this basis.

1976 McSteen Memorandum at 1 (Exhibit J, DJA 309).

TITLE II DISALLOWANCES BASED ON NON-SEVERE IMPAIRMENT[34]

Fiscal Year	% of Total Disallowances	Fiscal Year	% of Total Disallowances
1975	8.4	1981	43.2
1976	10.8	1982	38.9
1977	24.8	1983	39.4
1978	31.8	1984	34.3
1979	41.6	1985	23.3
1980	39.0		

III. SSA'S IMPROPER SEVERITY STANDARD HAS IMPOSED SEVERE AND IRREPARABLE HUMAN AND FINANCIAL COSTS ON DISABLED PERSONS AND THE STATES IN CONTRAVENTION OF CONGRESSIONAL INTENT.

A. *Application of SSA's Severity Standard Has Resulted in Incorrect Denials and Terminations of Disability Benefits.*

The results of SSA's court-ordered re-reviews of certain cases previously denied on the basis of a "non-severe" impairment reveals that the policy resulted in a substantial number of incorrect disability determinations. For example, in California, when SSA re-reviewed the cases of claimants who had been denied for this reason pursuant to the order in *Smith v. Heckler*, 595 F. Supp. at 1173, the reversal rate at the administrative hearing level was 45% for the period March 8, 1985 through July 6, 1986. In New

---

[34] *1986 Background Materials* at 114. The decrease in "non-severe" denials beginning in 1984 was a result of court orders enjoining application of the threshold severity standard in 12 States which, together, process approximately 29% of the disability applications nationally. SSA Statistics (June, 1986). The twelve states were: Illinois (*Johnson*), Iowa (*Campbell v. Heckler*, 620 F. Supp. 469 (N.D. Iowa 1985)), New York (*Dixon*), and Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington (*Smith v. Heckler*, 595 F. Supp. at 1173).

York, new reviews pursuant to *Dixon v. Heckler*, 589 F. Supp. at 1512, of claimants previously denied benefits as having "non-severe" impairments, resulted in a reversal rate of 41% at the hearing level. In other States in which SSA's severity standard was enjoined, similar results appear. Thus, in Illinois, the approval rate has climbed from 34.3% to 52% at the initial level since entry of the injunction in *Johnson v. Heckler* and from 14.8% to 34.1% at the reconsideration level.[35]

B. *SSA's Severity Standard Has Resulted in the Imposition of Added Costs Upon the State and Local Governments in Contravention of Congressional Intent to Relieve their Public Assistance Costs for the Care of the Disabled.*

As recognized by several courts,[36] and revealed in the legislative history, a principal congressional reason for enacting the SSD and SSI programs was to relieve State and local governments of public assistance costs for the care of the disabled, while assisting disabled individuals by providing them a measure of income security. Prior to the establishment of the SSD program in 1954, the entire burden of caring for the needy disabled rested exclusively on State, local, and private sources. In enacting the SSD program and the SSI program, which provide uniform federal cash assistance grants for the indigent aged, blind and disabled, 42 U.S.C. §§ 1381, *et seq.*, Congress recognized that many of the potential beneficiaries of the programs were receiving public

[35] The cited statistics were derived from SSA reports produced in discovery in the cited lawsuits.

[36] *City of New York v. Heckler*, 578 F. Supp. at 1121; *Dixon v. Heckler*, 589 F. Supp. 1512, 1516 (S.D.N.Y. 1984); *Holden v. Heckler*, 584 F. Supp. 463, 481 (N.D. Ohio 1984); *Avery v. Heckler*, 584 F. Supp. 312, 316 (D. Mass. 1984). *See also Doe v. Heckler*, 568 F. Supp. 681, 683 (D. Md. 1983) (Distinguishes SSD from SSI program, recognizing that the latter is a federally-funded disability benefits program replacing state-administered programs).

assistance funded by State and local governments,[37] that the cost of providing these benefits was rising[38] and, just as significantly, that establishment of the programs would result in substantial savings to the States and local governments.[39]

Despite this clear congressional purpose, SSA's imposition of the severity standard resulted in human[40] and financial costs for the States and their disabled citizens. Due to their disabilities, these persons were unable to return to work[41] and many had

[37] *See* S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S. Code Cong. & Admin. News 3880 (noting that many of the older disabled workers had relied on "State and local general assistance programs"); S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News 3623.

[38] House Comm. on Ways and Means, Rep. No. 92-231, 92d Cong., 2d Sess.(1972) [hereafter *1972 House Report*], *reprinted in* 1972 U.S. Code Cong. & Admin. News 4992.

[39] When enacted, it was estimated that in its first year, the SSD program would save the States $28 million. S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News 3623. When the SSI program was enacted in 1972, it was estimated that the program would save the States $1.644 billion. 1972 House Report, *reprinted in* 1972 U.S. Code Cong. & Admin. News 5202. *See also* the statements on the floor of the House of Representatives by Rep. Wilbur Mills, Chairman of the Committee on Ways and Means recognizing these savings, 117 Cong. Rec. H21092 (June 21, 1971).

[40] The denial or loss of federal disability benefits resulted often not only in a concurrent loss of dependents' benefits for other family members, *see* 42 U.S.C. § 402, but also in medical decompensation, reinstitutionalization, family breakups, and homelessness. *City of New York v. Heckler*, 578 F. Supp. at 1118-20.

[41] A 1979 SSA study concluded that only 1 in 10 persons denied disability benefits later engages in substantial gainful activity. *See June 30, 1983 House Ways and Means Comm. Hearing* at 239 (Statement of John D. Harris, President, National Council of SSA Field Operations Locals, AFGE).

little or no other income;[42] so the denial or loss of federal disability benefits led many to lose their homes, cars and other possessions. Just as importantly, they were forced to become dependent on relatives, borrow from friends, seek private charity, or apply for State and/or locally-funded public assistance to feed, clothe, and shelter themselves.

This public assistance took the form of cash benefits under the Aid to Families with Dependent Children Program, 42 U.S.C. §§ 601, *et seq.*, and State and locally funded General Assistance programs,[43] and Medicaid benefits,[44] as well as the provision of public shelters, food banks, medical care in public hospitals, clinics, and nursing homes, and various social and rehabilitative services, mostly funded with State and local revenues. In addition to these direct costs, there were other indirect costs to the States and localities such as increased use of emergency medical services and police services.[45]

---

[42] *See, e.g.*, New York State Division of Operations Bureau of Operations Analysis, *Accelerated Continuing Disability Investigation Cessations: A Characteristics Profile of Affected Persons* (July, 1982) [hereafter *New York State* CDI Study], *reprinted in Social Security Disability Benefits Terminations: New York: Hearing Before the Subcomm. on Retirement Income and Employment of the House Comm. on Aging*, 97th Cong., 2d Sess. (July 19, 1982) [hereafter *July 19, 1982 House Aging Comm. Hearing*] at 177 (The typical claimant terminated from benefits was a single male, age 41, who has no income other than his disability benefits.)

[43] Statewide General Assistance is provided to recipients on a continuing basis in 33 States. Dept. of Health and Human Services Office of Ass't Sect'y for Planning and Evaluation, *Characteristics of General Assistance Programs* (May, 1983). In the remaining States, GA is available in some but not all counties, or on an emergency, one-time only basis. *Id.*

[44] For example, in Pennsylvania, the cost of providing Medicaid benefits to individuals denied or terminated from federal disability benefits for all reasons was estimated to be $42,609,567 annually. Mental Health Association of Pennsylvania, *Financial Impact on Pennsylvania and Philadelphia on Terminations and Denials of Benefits to SSI/SSDI Applicants and Recipients, reprinted in Social Security Disability Reviews of the Mentally Disabled: Hearings Before the Senate Comm. on Aging*, 98th Cong., 1st Sess. 253–54 (Apr. 7 and 8, 1983).

[45] *June 30, 1983 House Ways and Means Comm. Hearing* at 136 (Statement of Liane Levetan, Commissioner, DeKalb County, Georgia, on Behalf of the National Association of Counties).

The full extent of State-funded assistance necessitated by SSA's improper severity standard is difficult to determine. However, there are estimates that between 30%[46] and 61%[47] of the persons terminated from federal disability benefits were eligible for GA and AFDC benefits, with some estimates going higher.[48] The resulting shift, from the federal government to the States, of the costs of caring for the disabled was in direct contravention of Congress' intent when it established the federal disability programs. The State and local governments will continue to be compelled, improperly, to bear these costs until SSA is required to apply a *de minimis* threshold standard in compliance with the Act.

IV. THE AMBIGUOUS NATURE OF SSA'S NEWEST THRESHOLD SEVERITY POLICY, SSA'S PRACTICE OF REPEATEDLY CHANGING ITS STANDARD DESPITE THE LACK OF ANY CHANGE IN THE STATUTE, AND THE STATES' NEED FOR A CLEAR AND PROPER POLICY WARRANT AFFIRMANCE OF THE COURT OF APPEALS' JUDGMENT.

SSA recently issued two internal rules which, while they might arguably be read to re-adopt the prior slightness standard, reveal the need for revised SSA regulations. SSA Rulings 85-28 and 86-8

---

[46] State of Michigan Interagency Task Force on Disability, *The SSI/SSDI Disability Controversy: How and Why the Social Security Administration Has Reduced the Number of SSI/SSDI Beneficiaries* (April, 1983), *reprinted in Social Security Disability Reviews: A Federally Created State Problem: Hearing Before the House Comm. on Aging*, 98th Cong., 1st Sess. (June 20, 1983) at 544.

[47] New York State CDI Study, *reprinted in July 19, 1982 House Aging Comm. Hearing* at 177.

[48] In New York, as a result of SSA's application of improper disability adjudication standards, courts have ordered the agency to re-review prior denial and termination decisions in three cases. *Schisler v. Heckler*, 107 F.R.D. 609 (W.D.N.Y. 1984), *aff'd*, 787 F.2d 76 (2d Cir. 1986); *Dixon v. Heckler*, 589 F. Supp. at 1512; *City of New York v. Heckler*, 578 F. Supp. at 1109. Approximately 75% of the disability claimants reinstated as a result of these new reviews previously received State and local public assistance. Gottfried, Assemblyman Richard N., *New York's Disabled Advocacy Program: Human Service and Fiscal Savings* (May, 1986).

withdraw SSA Rulings 82-55 and 82-56,[49] respectively, and provide that a claim is to be denied as "not severe" without consideration of vocational evidence:

> ... when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities.)

While these Rulings are incorrect in at least one respect and some of the language, read in isolation, appears to return to a "slightness" standard, other provisions of the Rulings suggest that it was not SSA's intent to reintroduce a *de minimis* standard.[50] For example, SSA Ruling 85-28 provides at page 23:

> If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work *because of the unique features*

[49] SSA's apparent effort to change its policy by returning to a slightness standard in SSA Ruling 85-28 was undermined by the agency's failure to withdraw SSA Ruling 82-56, which continued to provide that persons who could not return to their prior work could be denied as having non-severe impairments. SSA Ruling 86-8 attempts to cure this contradiction in policy by withdrawing SSA Ruling 82-56.

[50] SSA Ruling 85-28 states that SSA's threshold standard has never been more than a *de minimis* test. This is incorrect. *See* Section II.B. Indeed, the cases cited in the Ruling as supporting this conclusion reached the opposite conclusion. *Stone v. Heckler*, 752 F.2d at 1101; *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984). In both of those cases, the courts ruled that SSA's severity regulations exceeded any *de minimis* test as applied to the facts in the respective cases. Rather than invalidate the improper regulations, those courts chose to require SSA to interpret them as embodying a *de minimis* test.

> *of that work*, a denial at the "not severe" step of the sequential process is inappropriate.

To the extent that this exception is limited to "the unique features" of past work, it appears to reflect a continuation of SSA's policy of requiring denials and terminations for other claimants who cannot return to their prior work because of their impairments, without consideration of vocational factors. If this is true, SSA's threshold severity policy continues to transgress the Social Security Act's burden of proof requirements. Claimants would still be denied benefits without being given the opportunity to prove that they are unable to do their past work or to then have the burden of proof shift to SSA to show other gainful activity that they can perform. In addition, while SSA Ruling 85-28 refers to "ability to do basic work activities" as evidence of a "non-severe" impairment, the policy statement does not indicate whether a claimant must be found able to perform only a few, most, or all of the "basic work activities" to be denied benefits on this basis.

Further, SSA has issued internal rules interpreting SSA Ruling 85-28 which, once again, set forth as SSA policy examples of impairments which should be found "non-severe" despite the inability of claimants to return to their former employment.[51] These rules, like SSA Ruling 85-28 itself, demonstrate the facility with which SSA adopts, withdraws, re-adopts and modifies agency policy through internal rules, despite the lack of any change in the relevant statutes. These repeated changes suggest that SSA may continue to "re-interpret" the severity regulations in contradictory ways unless they are modified to specify the slightness standard which is consistent with the Act.

Added to the internal ambiguities in SSA Ruling 85-28 and its subsequent interpretations is the fact that the federal agency has never withdrawn or revised the applicable federal regulations. Those regulations continue to require that claimants be denied and terminated from benefits if their impairments do not "... ***significantly limit*** the individual's physical or mental capacity

[51] SSA Program Circular: Disability No. 12-85-OD entitled, "Evaluation of Medical Impairments That Are Not Severe," dated January 14, 1986 (Exhibit N).

to perform basic work-related functions." 20 C.F.R. §§ 404. 1520(c); 416.920(c). As discussed above, at least since 1976, this test has been applied as more than the slightness standard referenced in SSA Ruling 85-28.

SSA's reliance on the seemingly conflicting standards in the published regulations and unpublished internal rulings reveals the confused state of SSA's current threshold policy[23] and leaves the State DDSs in an even more untenable position than before. If they apply the published federal regulations as they have always been applied, they would violate the Act's requirement of providing disability assessments with full consideration of vocational factors for all claimants with more than slight impairments. If they do not comply with those federal regulations, they risk receiving more case returns and the imposition of severe financial and administrative sanctions, recently accelerated through new legislation. Added to this confusing situation is the fact that if the State DDSs apply the seemingly less restrictive but still ambiguous test set forth in SSA Ruling 85-28, they also risk sanctions because that standard would appear to conflict with the regulatory one.

For these reasons and because they continue to bear the public assistance costs of caring for the disabled persons improperly denied benefits, the *amici* States endorse respondent's position that the federal regulations must be modified to comply with the Act. The current regulatory prohibition against conducting a full disability assessment unless the claimant's impairment "significantly limits" his or her ability to work must be amended. In its place, the regulations should provide that denials and terminations at step two can occur only in those cases where the claimant's impairment(s) are so slight as to have no more than a minimal impact on the individual's ability to work.

---

[23] Even SSA has recognized that there has been "misunderstanding" with regard to its severity policy. SSA Memorandum from Patricia M. Owens, Associate Commissioner for Disability, to Disability Determination Services Directors Re: Clarification of "Not Severe Impairment" Policy and Implementation Plans - ACTION, dated October 18, 1985 at 1 (Exhibit O).

CONCLUSION

For the reasons set forth above, the *amici* States urge the Court to affirm the judgment of the Court of Appeals for the Ninth Circuit.

Dated: New York, New York
October 3, 1986

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
(212) 488-3943

O. PETER SHERWOOD
Solicitor General
Counsel of Record

(8)

No. 85-1409

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

-against-

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE CITIES OF NEW YORK, PHILADELPHIA, LOS ANGELES, BOSTON, AND CHICAGO IN SUPPORT OF RESPONDENT

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007
(212) 566-3801
Counsel of Record

LEONARD KOERNER,
MICHAEL D. YOUNG,
ALEXANDRA S. BOWIE,
of Counsel.

See next page for additional counsel

37pp

Handsel B. Minyard
City Solicitor
City of Philadelphia
1500 Municipal Services Building
Philadelphia, PA 19102
(215) 686-5230

James K. Hahn
City Attorney
City of Los Angeles
Thomas C. Bonaventura
Managing Assistant City Attorney
Julie Downey
Jessica Heinz
Deputy City Attorneys
200 North Main Street
Los Angeles, CA 90012
(213) 485-4288

Judson H. Miner
Acting Corporation Counsel
City of Chicago
Peggy A. Davis
Assistant Corporation Counsel
Joel D. Stein
Chief Assistant Corporation Counsel
Affirmative Litigation Division
180 North LaSalle Street, Suite 704
Chicago, Illinois 60601
(312) 744-9020

Joseph I. Mulligan, Jr.
Corporation Counsel
City of Boston
Albert W. Wallis
First Assistant Corporation Counsel
Law Department
City Hall, Room 615
1 City Hall Square
Boston, MA 02201
(617) 725-4020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

MISCELLANEOUS

No. 85-1409

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

-against-

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE CITIES OF NEW YORK, PHILADELPHIA, LOS ANGELES, BOSTON, AND CHICAGO IN SUPPORT OF RESPONDENT

I. Interest of the Amici Curiae

The Cities of New York, Philadelphia, Los Angeles, Boston, and Chicago ("the cities") submit this brief in support of respondent's position that step two of the

Secretary's sequential evaluation process, 20 C.F.R. §§ 404.1520(c) and 416.920(c) ("the severity regulation"), violates Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401 et seq.; 1381 et seq. (1982 & Supp. III 1985) ("the Act") by allowing the Secretary to deny claims for disability benefits without considering the effect of an individual's impairments on his or her ability to work.

The cities seek to protect the interests of their disabled citizens in the fair resolution of claims for disability benefits. Many of their citizens have been injured by the unlawful policy respondent challenges. See Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), petition for rehearing en banc denied, 776 F.2d 166 (1985), petition for cert. filed, 54 U.S.L.W. 3600 (U.S. March 11, 1986) (No. 85-1442); Smith v. Heckler, 595 F.Supp. 1173 (E.D. Cal. 1984); appeal pending, No. 85-2178; Dixon v. Heckler, 589

F.Supp. 1494 (S.D.N.Y. 1984), aff'd, 785 F.2d 1102 (2d Cir. 1985), petition for cert. filed, 55 U.S.L.W. 3017 (U.S. July 15, 1986) (No. 86-2). The cities also seek to protect their fiscal interests by ensuring that all their citizens who are entitled to federal Social Security disability benefits obtain them instead of continuing to receive state and locally funded public assistance. One effect of the challenged policy has been to shift the costs of caring for needy disabled individuals from the federal government to the amici cities.

The costs to the cities of paying benefits to thousands of individuals whose claims have been denied under the Secretary's illegal policy is substantial.[1]

---

[1] By 1982, under the Secretary's severity policy, 40.3% of claims were denied on the (Footnote Continued)

When the costs of caring for these individuals is borne by the federal government, as they should be under the law, the savings to the cities are quite large. For example, approximately 2000 people in New York State, approximately 60% of whom live in New York City, have received about $10 million in benefits under the injunction issued in Dixon. The New York Law Journal, March 18, 1986, at 1. The City of New York thus saves approximately $3,048,000 annually. Other cities save similar amounts.[2]

(Footnote Continued)
ground that the claimant did not have a "severe" impairment. Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985); Dixon v. Heckler, 589 F.Supp. at 1503-04.

[2] The cities of Philadelphia and Chicago provide food, emergency shelters and medical care for their homeless population, as well as providing social services and emergency food to needy residents. Such programs cost
(Footnote Continued)

This shift of the financial burden of caring for needy disabled individuals from the federal government to the major cities is directly contrary to the intent of Congress, in enacting Titles II and XVI of the Social Security Act. Congress, in fact, enacted Title II and amended Title XVI of the Social Security Act in order to shift the burden of caring for the elderly and disabled from the states and localities to the federal government.[3]

(Footnote Continued)
Philadelphia $18 million in 1985, and Chicago $6.7 million in 1984. The other amici cities provide similar services and incur similar costs. Since some of the recipients of public assistance programs should be receiving Social Security disability benefits, overstrained municipal budgets are relieved of part of their burden when the federal government bears its proper share of caring for needy disabled citizens.

[3] See e.g., S. Rep. No. 1669, 81st Cong., 2d Sess. (1950), reprinted in 1950 U.S. Code, Cong. & Admin. News 3287, (Footnote Continued)

The amici cities have taken the lead in fighting the Secretary's policies that cause this shift. For example, last Term this Court ruled, in a case brought by the City of New York, which was joined by the City of Chicago as amicus curiae, that the Secretary had the duty and the capability to prevent an illegal policy that resulted in the denial of benefits to mentally disabled claimants. The Court affirmed the lower court's order directing the reopening of claims which were denied or terminated on the basis of the illegal policy. Bowen v. City of New York, 54 U.S.L.W. 4536 (U.S. June 2, 1986).

(Footnote Continued)
3287-88; S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), reprinted in 1956 U.S. Code, Cong. & Admin. News 3877, 3879-80; S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Admin. News 3603, 3622-23; H. Rep. No. 92-231, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code, Cong. & Admin. News 4989, 4992.

SUMMARY OF ARGUMENT

The Secretary's severity regulation violates the Act by denying a claimant the opportunity to prove that his or her impairment is the cause of his or her inability to work. The sequential evaluation process is cut short at step two for those claimants whose impairment is presumed, on medical grounds alone, to be insufficiently severe to be a cause of the inability to work. Those claimants do not get the chance to establish the actual causal relationship between the impairment and the incapacity.

Moreover, the severity regulation violates the burden of proof rules, which the Secretary and the Court of Appeals in every circuit has interpreted the Act to contain. These rules provide that a claimant who has

shown that an impairment prevents him or her from doing past work has made out a prima facie case of disability. The burden shifts to the Secretary to show that the claimant remains capable of performing other work. Under the severity regulation, claimants who cannot show that their impairments are "severe" are not allowed the chance to establish a prima facie claim of disability.

In the alternative, if the severity regulation is to be upheld, it must be narrowly construed as a de minimis screening requirement. The substantial evidence developed in the district courts in cases challenging the severity regulation shows that the Secretary did not apply the regulation as a de minimis standard at the time respondent's case was decided. Given that evidence, respondent's case should be remanded to the district court for a

determination whether the Secretary is indeed now applying a de minimis standard. Moreover, the relief granted in the district courts to class members in the cases challenging the policy who were harmed by the illegal application of the severity regulation must stand.

ARGUMENT

POINT I

THE SECRETARY'S SEVERITY REGULATION VIOLATES THE ACT BY CUTTING OFF THE SEQUENTIAL EVALUATION PROCESS PREMATURELY, AND BY IGNORING LONG-STANDING BURDEN OF PROOF RULES

The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . . " 42 U.S.C. § 423(d)(1)(A) (1982). For purposes of that definition:

> An individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work . . .

42 U.S.C. § 423(d)(2)(A) (Supp. III 1985). In other words, the statute requires that the Secretary must consider both the nature of

the claimant's impairment, and its effect on his or her ability to work.

The severity regulation provides, however, that the Secretary may find that an individual is not disabled without considering the actual relationship of the impairment to his or her ability to work. The regulation states:

> You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. §§ 404.1520(c); 416.920(c) (emphasis in original). The Secretary is to make this finding on the basis of medical grounds alone.

The Secretary's regulation violates the Act because it prevents a claimant from showing that his or her particular disability

is the cause of the inability to work. The regulation, instead of allowing the claimant to establish the causal relationship, as embodied and demonstrated in the facts of his or her own case, requires a claimant to establish, in the abstract and with no relation to those facts, that an impairment is so severe that it could be a substantial cause of inability to work in general.[4] It

---

[4] In other words, the statute requires the Secretary to take account of a claimant's age, education, and work experience when considering the severity of a claimant's impairment, while the regulation allows the Secretary to determine severity without considering those factors.

> The statute speaks of an impairment (or impairments) which is 'of such severity that' the claimant cannot, 'considering his age, education and work experience,' perform any substantial gainful work. Under the severity regulation, by contrast, the Secretary had found that plaintiffs do not have severe

(Footnote Continued)

does not allow the claimant a chance to prove that it actually has impaired his or her own ability to work. If a claimant is denied benefits because the impairment is not "severe," the sequential evaluation process ends before the claimant has had a chance to establish this causal relationship.

Truncating the sequential evaluation procedure on this basis violates the burden of proof rules, which all the circuit courts of appeals, and the Secretary, agree are contained in the Act, by preventing claimants who cannot show that their impairments are "severe" from establishing a

---

(Footnote Continued)
impairments, and therefore are not disabled, without considering whether their impairments, in light of their age, education and work experience, permit them to perform gainful work.

Dixon, 589 F.Supp. at 1502.

prima facie claim of disability. The twelve circuit courts of appeals are unanimous in holding that the claimant makes a prima facie showing of disability when he or she demonstrates an impairment that prevents him or her from performing previous work. The burden then shifts to the Secretary to show that the claimant remains capable of performing other work considering the claimant's age, education, and work experience. Hernandez v. Weinberger, 493 F.2d 1120, 1122-23 (1st Cir. 1974); Rivera v. Schweiker, 717 F.2d 719, 722-23 (2d Cir. 1983); Choratch v. Finch, 438 F.2d 342, 343 (3d Cir. 1971); Smith v. Califano, 592 F.2d 1235, 1236 (4th Cir. 1979); Lewis v. Weinberger, 515 F.2d 584, 587 (5th Cir. 1975); O'Banner v. Secretary, 587 F.2d 321, 322 (6th Cir. 1978); Whitney v. Schweiker, 695 F.2d 784, 786 (7th Cir. 1982); Garrett v. Richardson, 471 F.2d 598, 603-04 (8th

Cir. 1972); Hall v. Secretary, 602 F.2d 1372, 1375 (9th Cir. 1979); Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984); Francis v. Heckler, 749 F.2d 1562, 1564 (11th Cir. 1985); Meneses v. Secretary, 442 F.2d 803, 806 (D.C. Cir 1971).[5] This formulation of the burden of proof rules has been adopted by the Secretary in his regulations. 43 Fed. Reg. 55359 (November 28, 1978).

Under the severity regulation, however, the Secretary does not allow a claimant the chance to establish a prima facie case. The Secretary does not consider proof that the

---

[5] The claimant's burden encompasses the first four steps of the sequential evaluation process. If the claimant gets that far, the burden passes to the Secretary at step five. See Bluvband v. Heckler, 730 F.2d 886, 891 (2d Cir. 1984). If the severity step is truly a de minimis screening device, then it is consistent with the burden of proof rules. See infra at 21-24.

claimant cannot perform his or her prior work if the claimant cannot first satisfy the severity standard, Dixon, 589 F.Supp. at 1505-06, thereby cutting short the sequential evaluation process. See Smith v. Heckler, 595 F.Supp. 1173, 1178 (E.D. Cal. 1984), appeal pending, No. 85-2178.[6]

---

[6] Petitoner has never, until this stage of this litigation, challenged the burden of proof rules. Indeed, as noted above, petitioner has adopted them, to the point of treating the severity regulation as consistent with that rule, at least when the claimant's past work had unique features, in their latest "clarification" of the severity policy. SSR 85-28, reprinted in Petition ("Pet.") at 37a, 43a. SSR 85-28 has been read as adopting the burden of proof rules. See McDonald v. Secretary, 795 F.2d 1118, 1126 n.9 (1st Cir. 1986). Nonetheless, in his brief to this Court, petitoner asserts that "[n]othing in the Social Security Act suggests that the disability determination process must be rigidly confined to just two such steps" and that the Act does not "mandate that a claimant may establish a 'prima facie' case by showing that he is unable to do his past relevant work." Petitioner's Brief at 29 n. 15. Petitioner's

(Footnote Continued)

The case histories of the plaintiffs in the various cases challenging the Secretary's severity policy demonstrate that the effect of truncating the sequential evaluation is to deny individuals full consideration of their claims of disability.[7] For example, in Baeder v. Heckler, the Secretary found that a 55-year-old man, suffering from arthritis, diabetes, vertigo, headaches, and chest pains with shortness of breath diagnosed as

---

(Footnote Continued)
attempt to overturn this settled body of law should be rejected.

[7] In fact, the Secretary admitted as much in 1980 in commenting on the revisions of the regulations.

> We anticipated that greater program efficiency would be obtained by this provision by limiting the number of cases in which it would be necessary to follow the vocational evaluation sequence....

Dixon v. Heckler, 589 F. Supp. at 1504, quoting 45 Fed. Reg. 55574 (1980).

"significant pulmonary obstructive disease" did not have a severe impairment. Because of this finding, the Secretary did not allow the claimant to demonstrate that his lack of education, his experience of 27 years in the same industrial plant, his attempts to continue working by switching to less strenuous positions, or even his age, contributed, with his impairment, to his inability to work. See Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985). Had the severity regulation not been applied so as to set an arbitrary "threshold" standard, the Secretary would have considered the correct causal relationship: Mr. Baeder's various physical impairments, combined with his age of 55 years, had forced him to quit working, even though he had attempted to continue working by taking less strenuous positions within his company. He should have been allowed to demonstrate this relationship. See

also Munoz v. Secretary, 788 F.2d 822 (1st Cir. 1986); Mowery v. Heckler, 771 F.2d 966 (6th Cir. 1985).[8]

---

[8] The Secretary's policy can also lead to absurd results. For example, the Secretary recently argued that an Administrative Law Judge's decision that an impairment was not severe should be upheld even though the Secretary conceded in his brief to the circuit court that the claimant's impairment met the listings. Williamson v. Secretary, 796 F.2d 146 (6th Cir. 1986). Because the impairment was deemed "not severe", the sequential evaluation process ended at step two, and benefits were denied. The Secretary argued that the fact that the impairment met the listings was "irrelevant" when the sequential evaluation process ended at step two, because the listings are considered at step three. 796 F.2d at 150-51. The court rejected the Secretary's kafkaesque reasoning.

POINT II

THE SEVERITY REGULATION MUST BE CONSTRUED AS A de minimis REQUIREMENT IF IT IS TO BE UPHELD AS CONSISTENT WITH THE SOCIAL SECURITY ACT.

If this Court upholds the severity regulation as consistent with the Act, it must be construed as a de minimis standard. Moreover, if the regulation is allowed to stand, this Court should not limit any of the retroactive relief granted in the cases challenging the severity regulation around the country. The plaintiffs in those cases have shown over and over that the Secretary has not been implementing the severity regulation as a de minimis standard.

The regulatory history of the severity regulation demonstrates that it was originally intended as a de minimis standard. The severity standard was promulgated in 1968,

and revised in 1978 and 1980. In the 1968 regulations, the Secretary stated:

> Medical considerations alone can justify a finding that the individual is not under a disability where the impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities.

33 Fed. Reg. 11749, 11750 (1968) (emphasis added); see also Brady v. Heckler, 724 F.2d 914, 918 (11th Cir. 1984). Thus, as the Secretary originally conceived it, the severity regulation screened out only individuals with minor ailments.

In 1978, the Secretary amended the regulation to state that an impairment which did not significantly limit an individual's ability to perform "basic work-related functions" would not be considered severe. The regulation further provided that a claimant with such an impairment would be denied benefits without consideration of his

or her age, education, or work experience. Salmi v. Secretary, 774 F.2d 685, 691 (6th Cir. 1985), quoting 43 Fed. Reg. 55349, 55371 (1978). In commenting on the new regulations, the Secretary stated:

> [T]here is no intention to alter the levels of severity for a finding of disabled or not disabled on the basis of medical considerations alone, or on the basis of medical and vocational considerations.

Salmi, 774 F.2d at 691, quoting 43 Fed. Reg. 55358 (1978).

In 1980, the current regulation was promulgated. As at least one court has found, the 1980 recodification "evinced no change in this expression of the Secretary's intent, 45 F.R. 55574." Chico v. Schweiker, 710 F.20 947 (2d Cir. 1983); see also Salmi, 774 F.2d at 691.

Furthermore, a 1980 statement of the Appeals Council sets forth its policy

regarding findings of severity and concludes that the 1980 regulation:

> was not intended to change, but was merely a clarification of the previous regulatory terms 'slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities ...." In other words, an impairment can be considered as 'not severe' only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience.

Brady v. Heckler, 724 F.2d 914, 919-20 (11th Cir. 1984) quoting Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations (1980).

Thus, under a narrow construction of the regulation, an impairment can be considered not severe only if the impairment is so slight that, regardless of a claimant's age, education, and work experience, it would not affect that particular claimant's

ability to work. See Salmi, 774 F.2d at 691-92; Brady, 724 F.2d at 920. The statement of the Appeals Council, coupled with the Secretary's various statements each time the regulation was promulgated, have persuaded those courts that have upheld the severity regulation that "[t]hough the 1968, 1978, and 1980 regulations use vastly different words to describe severe impairment, the standard has not changed throughout the years," and that the severity regulation should be narrowly construed. Salmi, 774 F.2d at 691; Brady, 724 F.2d at 920; Evans v. Heckler, 734 F.2d 1012, 1014 (4th Cir. 1984); Stone v. Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985).

Social Security Ruling 85-28 purports to implement a de minimis standard. It recites the history of the regulation, Pet. at 37a-40a, and it urges that "great care" should be taken in applying "the not severe

impairment concept." Pet. at 44a.[9] Whether the Secretary is actually implementing a de minimis standard under SSR 85-28 is, however, a factual question to be decided in the district courts.

There is no evidence that the Secretary is implementing the SSR as a way of screening out only those claims based on minor impairments. SSR 85-28 was promulgated only recently, in October, 1985. There is some evidence that even the Secretary does not believe that it

---

[9] On the other hand, SSR 85-28 does not clearly adopt the burden of proof rules, and the Secretary questions those rules in his brief to this Court. See supra at 13-16. In fact, one court has held that, having once held the regulation invalid in light of its history and the statistics regarding its application, the Secretary may not apply the regulation and was not presented with an opportunity to develop a de minimis interpretation of the regulation as now written in SSR 85-28 by the decision in Baeder, the previous case. Wilson v. Secretary, 796 F.2d 36, 41-42 (3d Cir. 1986).

will make any difference to the evaluation of the severity of claims. See, e.g., Munoz v. Secretary, 788 F.2d 822, 823 (1st Cir. 1986), where the court rejected the Secretary's contention that SSR 85-28 was not applied to the claimant's case but that if the ALJ had applied the ruling "'the administrative decision would have been the same.'"

Substantial statistical evidence exists, moreover, that shows that even if SSR 85-28 sets out a de minimis policy the Secretary intends to follow, before the issuance of SSR 85-28 "the severity regulation ha[d] become, in practice, more than a de minimis screening device." McDonald v. Secretary, 795 F.2d 1118, 1124 (1st Cir. 1986). The number of claimants denied benefits at step two rose sharply between 1978 and 1982. See supra n.1 (increase from 8.4% to 40.3% found in Baeder and Dixon); McDonald, 795

F.2d at 1124 (increase in step two denials to Massachusetts claimants rose to 25 to 31.4% in 1984 and 1985). The experience of claimants in areas where the application of the severity regulations has been enjoined are similarly telling. In Illinois, before the Johnson injunction was issued, 34.3% of claimants were found disabled. The ratio rose to 52% after the injunction was entered. Similarly, the percentage of claimants allowed benefits on reconsideration rose from 14.8% to 34.1% See Brief of Amici Curiae American Diabetes Association, et al., at 18-19.

Finally, the experience of class members whose claims were reevaluated under the orders of the Dixon, Smith, and Johnson courts show that the regulation was not applied as a de minimis standard during the relevant time periods. Over 40% of the claimants reevaluated under the Dixon and Smith orders, who had been denied benefits

on the grounds that their impairments were not severe, received benefits. Johnson class members were found to be disabled on reconsideration at a rate of about 31%. Id. at 19.

The records in the district courts in which the severity regulation was challenged indicate two steps for this Court to take. First, the Court should remand respondent's claim to the district court for the application of a de minimis standard. Second, the Court should ensure that, no matter how it views the current state of the severity regulation, the relief accorded class members shown in other challenges to the severity regulation to have been injured by the Secretary's use of the severity regulation should not be disturbed. Moreover, those district courts are the forums in which to determine whether SSR 85-28 is in reality implementing a de minimis standard.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed. In the alternative, the severity regulation should be narrowly construed and the case remanded, with instructions to the district court to apply a de minimis standard and to consider whether SSR 85-28 implements a de minimis standard.

Dated: New York, New York
October 6, 1986

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York, Amicus Curiae
Counsel of Record

LEONARD KOERNER,
MICHAEL D. YOUNG,
ALEXANDRA S. BOWIE,
of Counsel.

See next page for additional counsel

Handsel B. Minyard
City Solicitor
City of Philadelphia
1500 Municipal Services Building
Philadelphia, PA 19102
(215) 686-5230

James K. Hahn
City Attorney
City of Los Angeles
Thomas C. Bonaventura
Managing Assistant City Attorney
Julie Downey
Jessica Heinz
Deputy City Attorneys
200 North Main Street
Los Angeles, CA 90012
(213) 485-4288

Judson H. Miner
Acting Corporation Counsel
City of Chicago
Peggy A. Davis
Assistant Corporation Counsel
Joel D. Stein
Chief Assistant Corporation Counsel
Affirmative Litigation Division
180 North LaSalle Street, Suite 704
Chicago, Illinois 60601
(312) 744-9020

Joseph I. Mulligan, Jr.
Corporation Counsel
City of Boston
Albert W. Wallis
First Assistant Corporation Counsel
Law Department, City of Boston
City Hall, Room 615
1 City Hall Square
Boston, MA 02201
(617) 725-4020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

—against—

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS

ALFRED MILLER
PETER N. GREENWALD
MILLER, SINGER, & RAIVES, P.C.
Attorneys for Amicus Curiae
American Association of Retired Persons
555 Madison Avenue
New York, New York 10022
(212) 752-8830

Of Counsel
STEVEN ZALEZNICK
MICHAEL R. SCHUSTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1409

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

– against –

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS

Statement of Interest of Amicus Curiae

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than twenty-three million persons over the age of fifty. AARP is the largest organized group of older Americans in the country. In representing the

interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the work force. Accordingly, AARP sought and received the consent of the parties to the filing of this brief *amicus curiae*.

Many members of AARP continue to work and contribute to the Social Security trust fund; many others, however, are claimants for and recipients of disability benefits under Titles II and/or XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 401 *et seq.* and 1381 *et seq.*[1] In either case, the members of AARP have an interest in ensuring that the Social Security Administration ("SSA") properly determines initial disability claims and requests for continued disability benefits consistent with the Act, including the requirement that the age of claimants be appropriately considered in evaluating their "inability to work by reason of . . . [their] medically determinable physical or mental impairment[s]." 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A); *see also* 42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B) (establishing age as a factor).

Affirmance of the decision below will guarantee all claimants, but in particular those over 50 years of age, a proper individual assessment of their disability claims. The ruling below invalidated a threshold regulation that, as applied, established a stringent, overinclusive threshold step that was used to deny benefits to eligible claimants—a disproportionately large number of whom were over 50 years old. If the ruling is affirmed, individuals, including

[1] Title II establishes the insurance program that provides benefits to disabled workers who are fully insured, 42 U.S.C. § 423(a); to disabled widows, widowers and surviving divorced spouses of insured workers, 42 U.S.C. § 402(e), (f); and to qualifying children of insured workers, 42 U.S.C. § 402(d). Title XVI establishes the Supplemental Security Income ("SSI") available, *inter alia*, to disabled adults and children. 42 U.S.C. §§ 1381a, 1382c(a)(3)(A). Unless otherwise indicated, the edition for all United States Code citations herein is 1983 and Supp. 1986; and for C.F.R. citations is 1986.

AARP members in the various certified classes, will receive reevaluations that are proper under the Act[2] and, if eligible, the benefits which Congress intended they receive. If reversed, the Secretary will continue to have in place a regulation that can again be applied in a manner that will deny AARP members and others the benefits to which they are entitled. AARP urges affirmance of the Ninth Circuit's judgment.

ARGUMENT

SUMMARY OF THE ARGUMENT

I. A. The Act mandates that age be considered as a significant factor in determining disability. Congress, since 1956, has defined disability in the Act with reference to the claimant's age. Pub. L. No. 84-880 § 223, 70 Stat. 815 (1956), *codified at* 42 U.S.C. § 416(i) (1956). In 1968, age was explicitly introduced into the definition of disability as a vocational factor relevant to determining whether a claimant for benefits, who was unable to perform his past work because of his impairment(s), would be able to perform any substantial gainful activity in the national economy. Pub. L. No. 90-248 § 223, 81 Stat. 868 (1968), *codified at* 42 U.S.C. § 423(d)(2).

B. In this context, the claimant's age in the Social Security disability scheme is a highly individualized factor which by itself could result in differing results on claims for benefits by two individuals with identical medical conditions.

II. A. The Act authorizes the Secretary to determine disability consistent with the definition. It also allows a threshold screening of claimants who, regardless of their age, education,

[2] AARP notes that the Secretary has petitioned that this Court hold and dispose of at least two class actions, *Johnson v. Heckler*, 769 F.2d 1202, *rehearing en banc denied*, 776 F.2d 166 (7th Cir. 1985), *pet. for cert. filed sub nom. Bowen v. Johnson*, 54 U.S.L.W. 3600 (March 11, 1986) (No. 85-1442) (an Illinois class) and *Dixon v. Heckler*, 785 F.2d 1103 (2nd Cir. 1986), *pet. for cert. filed sub nom. Bowen v. Dixon*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2) (a New York State class), in light of the disposition here.

and work experience, have not presented an impairment that imposes enough limitations to ever be found disabling. This is known as a *de minimis* test.

In 1978, SSA adopted the current five-step disability adjudication policy, known as the sequential evaluation of disability, to determine whether a claimant met the statutory definition of disability. 43 Fed. Reg. 55349, 55363 (November 28, 1978), *codified at* 20 C.F.R. §§ 404.1520 and 416.920. In this sequence, the step two severity regulations, as applied by the Secretary, however, were not a valid *de minimis* step under the Act because the severity test screened out individuals—especially older claimants—who would have established eligiblity after a full evaluation of their claim.

The step two severity test was applied, at all relevant times, to deny a claim on the sole basis of medical records without any consideration *at all* of factors such as a claimant's age (or his actual residual capability to do his past work or any other work). 20 C.F.R. §§ 404.1520(c) and 416.920(c). This occurred because the step two denial shortcircuited the full evaluation of these factors which would not be provided until subsequent steps. *See Id.* at §§ 404.1520(f) and 416.920(f). As a result, the Secretary was denying claims at step two based solely on the nature of the medical impairment records irrespective of the claimant's age or functional ability to perform his past work.

B. Claimants who were at least fifty years old and who could no longer perform their past work were, in particular, losing claims for benefits at step two that would have been awarded—and were awarded prior to 1976—had the Secretary evaluated the claim at step five. The challenged step two regulations, therefore, have had a disproportionately adverse impact on elderly disability claimants in that step two denied them any consideration at all of a factor (age) that Congress had identified as crucial.

Because of repeated adverse court rulings holding that the step two severity policies as applied were not a *de minimis* step, the Secretary has recently attempted to change his construction of

the step two regulation (after seven years of implementation) by an interpretative ruling that purports to adopt a *de minimis* reading of the regulation. This 1985 ruling, Social Security Ruling ("SSR") 85-28 (October, 1985), was never applied to Ms. Yuckert. Moreover, it is a radical reversal from the Secretary's earlier interpretative rulings governing the application to claims of step two. *See* SSR 82-55 (effective Aug. 20, 1985) (Cum. Ed. 1982); SSR 82-56 (effective Aug. 20, 1980) (Cum. Ed. 1982). While the Secretary's apparent policy reversal may eliminate the adverse impact of the severity regulations on older claimants, no factual record on this new policy has been developed. Thus, it would be inappropriate for this Court to pass upon it. In the meantime, the Court should affirm the ruling below.

I. THE SOCIAL SECURITY ACT REQUIRES THE SECRETARY TO CONSIDER AGE AS A SIGNIFICANT FACTOR IN DETERMINING DISABILITY CLAIMS, AND UNDER THE ACT AN OLDER CLAIMANT MAY BE DISABLED BY REASON OF A MEDICAL IMPAIRMENT THAT WOULD NOT DISABLE A YOUNGER PERSON

A. The Social Security Act

When Congress established the Social Security Disability Insurance ("SSDI" or "Title II") Program in 1954, it provided disability benefits to insured individuals who were unable to work due to their medical impairments but only if they were between the ages of 50 and 65. Pub. L. No. 84-880 § 223, 70 Stat. 815 (1956), *codified at* 42 U.S.C. § 416 (1956). *See also* S.Rep. No. 2133, 84th Cong., 2nd Sess. 3-5, *reprinted in* 1956 U.S. Code Cong. & Ad. News 3877, 3941, 3947; S.Rep. No. 1987, 83rd Cong., 2d Sess. 21, *reprinted in* 1954 U.S. Code Cong. & Ad. News 3710, 3730; H.Rep. 1189, 84th Cong., 2d Sess. (1956). The program was expanded in 1960 to provide benefits to younger disabled workers. Pub. L. No. 86-778, § 401, 74 Stat. 967 (1960), *codified at* 42 U.S.C. § 423(a)(1960). When Congress did so, however, it left intact the definition of disability, as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C. § 423(d)(1)(A).

Then, in 1967, the definition of disability for SSDI was further amended to its current form. S.Rep. No. 744, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. Code Cong. & Ad News 2834, 2848. The Act's current definition of disability provides that a claimant must have a medically determinable impairment expected to result in death or to last twelve months, 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A), and further provides that:

> (2) For purposes of paragraph (1)(A) -
> (A) An individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . .

42 U.S.C. §§ 423(d)(2)(A); *see also* 42 U.S.C. § 1382c(a)(3)(B) (identical language).

The 1967 amendment was designed to check the "ero[sion]" of the "definition of disability" that had occurred "over . . . time." S. Rep. No. 744, 90th Cong. 1st Sess. (1967) *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 2880. Congress was concerned that some court decisions had given the existing definition too expansive a scope, with the result that some claimants had been found eligible whom Congress did not think should receive benefits. *Id.* at 2880-1. It resolved this problem by restating the basic definition of disability in 42 U.S.C. § 423(d)(1)(A), in terms setting forth the specific factors that Congress considered relevant to the disability determination. *Id.* at 2881-82.

One of the factors that Congress specifically wanted to remain relevant to disability eligibility determinations was the claimant's age. The amended definition of disability thus expressly required that the "age" of a claimant unable to do his past work must be considered in deciding whether he was able to do other work. 42 U.S.C. § 423(d)(2)(A).

The 1967 amendment's incorporation of age merely codified what was, and must be, considered a relevant factor in determining whether a claimant exhibits an "inability to engage in substantial gainful activity by reason of any medically determinative . . . impairment."[3] This is because a claimant's age significantly affects such "inability." First, the same medical impairment may be more incapacitating to an older claimant than it would be for a younger one. Second, an older claimant may have a more difficult time in adapting his "residual functional capacity" ("RFC") -- his physical capacity to work, despite his medical impairment -- to new jobs than would a younger claimant. *See* 20 C.F.R. §§ 404.1563(a) and 416.963(a).[4]

B. Age Under The Regulations and Rulings

1. Slightness Test

Under SSA regulations in effect prior to 1978, a claim would be denied if the medical impairment was so slight that it did not reduce the claimant's actual ability to work. *E.g.*, 20 C.F.R. § 404.1502(a) (1976). If the impairment was more than slight, it was evaluated against a "guide," later known as the "listing", of *per se* disabling conditions. If the impairment was found to be not of sufficient severity to match the listing, the claim was evaluated under the totality of circumstances, including the claimant's ability to do his past work or any other work given his age and evaluation of other vocational factors. *E.g.*, 20 C.F.R. § 404.1502(b) (1976).

---

[3] Prior to the 1967 amendment, age was specifically considered by the Secretary in making disability determinations. *See* Disability Evaluation Standards, § 325 (5/16/65), where the Secretary states that "in evaluating the effect of an impairment, it should be considered that the impairment may be more limiting for an older than a younger man" and that "[t]he aging process makes itself felt with respect to healing, prognosis, physiological degeneration, psychological adaptability and, in consequence, vocational capacity."

[4] *See* SSA Program Operations Manual System § DI00401.400A.2 (1-84) ("[R]eference sources and material dealing with chronological age in terms of vocational impact point to a direct relationship between age and the ability to adjust to work . . . [t]he regulations reflect age 55 and over as . . . representing the point when age could be expected to be an adverse consideration.")

2. Sequential Evaluation

The present sequential evaluation, adopted in 1978, is a five-step process by which the Secretary determines whether the claimant meets the statutory definition of disability. 20 C.F.R. §§ 404.1520 and 416.920. The fifth step of the Secretary's sequential evaluation process for the determination of disability claims specifically requires that if a claimant is unable to do his past work, SSA "will consider your residual functional capacity and your *age*, education and work experience to see if you can do other work." 20 C.F.R. §§ 404.1520(f) and 416.920(f) (emphasis added).

Under this sequential evaluation scheme, age is defined by the Secretary as chronological age. 20 C.F.R. §§ 404.1563 and 416.963. In the regulations, the Secretary explains that age is considered in determining disability because it "affects [a claimant's] ability to adapt to a new work situation and to do work in competition with others." *Id.* at (a). The Secretary divides age into four categories:

1. "Younger person . . . under age 50" for whom "age will [not] seriously affect [the] ability to adapt to a new work situation." *Id.* at (b);

2. "Person approaching advanced age . . . (50-54) for whom "age, along with severe impairment and limited work experience, may seriously affect [the] ability to adjust to . . . jobs in the national economy." *Id.* at (c);

3. "Persons of advanced age . . . (55 or over)" for whom "age significantly affects a person's ability to do substantial gainful activity." *Id.* at (d); and

4. Persons "close to retirement age . . . (60-64)" for whom age is even more limiting unless the claimant has "skills which are highly marketable." *Id.*[5]

[5] The comments accompanying the promulgation of these age classifications explained that "the statutory definition of disability provides specifically that

(Footnote Continued)

3. The Grids

To further provide uniformity and efficiency, the Secretary established the "medical-vocational" guidelines known as the "grids." 20 C.F.R. Part 404, Subpart P, Appendix 2. These are tables that determine whether a claimant who has reached the fifth step is disabled or not. The grid determination is made by reference to the four factors identified by Congress in the statutory definition of disability: physical ability, age, education and work experience.

The grids are three tables, each one tied to a particular residual functional capacity ("RFC"), i.e., the claimant's remaining ability to do the requirements of work despite his impairment(s). 20 C.F.R. §§ 404.1545 and 416.945 (defining RFC). There is one table for the RFC necessary to perform the exertional requirements of the three least demanding categories of work: medium, light and sedentary. 20 C.F.R. Part 404, Subpart P, Appendix 2; *see also* 20 C.F.R. §§ 404.1576 and 416.967; SSR 83-10 (January, 1983) (defining the physical exertion requirements of heavy, medium, light, and sedentary work). Each table is a chart directing a decision on the claim based on the various vocational factors of age, education, and work experience skills of the person retaining the particular RFC for that table. *See Heckler v. Campbell*, 461 U.S. 458 (1983).

Of the three vocational factors—age, education, and work experience—age is by far the most significant. For example, a claimant who retains the ability to perform medium exertional activities despite his impairments will be evaluated on Table 3.

vocational factors must be viewed . . . in terms of how the progressive deteriorative changes which occur as individuals get older affect their vocational capacities to perform jobs." 43 Fed. Reg. at 55353-54. Consistent with the categorization itself, the comments also explained that while "deteriorative changes . . . affect(ing) vocational capacities would most likely occur" at or after age 55, the age of younger claimants (from age 45) might also adversely affect their ability to work. Because of the progressive deteriorative nature of age, the age categories are not applied mechanically. *Id.* at 55354; *see* 20 C.F.R. § 404.1563(a). Age thus is the only vocational factor that is considered in a highly individualized, flexible manner. *Heckler v. Campbell*, 461 U.S. 458, 462 n.5 (1983).

Generally, a claimant, regardless of his vocational factors, will be found not disabled on this grid. *See* 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 3. The exceptions depend on the claimant's age. No matter how limited his education nor how unskilled his past work experience, the grid directs findings of "not disabled" unless the claimant is either of "advanced age" (55 to 59) or closely approaching "retirement age" (60 and over). *Id.*, Rules 203.10 and 203.01.[6] No other vocational factor alters the result; age is the critical factor.[7]

In sum, the statutory definition of disability (42 U.S.C. §§ 423(d)(1) and (2) and 1382c(a)(3), and the implementing federal regulations (including the grids) have always made the

[6] The same is true on the other grids. For example, the light grid directs "not disabled" findings for claimants who are illiterate and have unskilled past work unless they are also of approaching advanced age. *Compare id.* at Table 2, Rule 202.16 *with id.* Rule 202.09 and 202.01. Age is as important on the sedentary grid. Thus, even where past work developed a person's skills, advanced age could still overcome that positive vocational factor to result in a favorable decision. *Compare id.* at Table 1, Rules 201.24 and 201.18 *with id.* Rules 201.09 and 201.01 (claimant will receive different results despite limited or less education, unskilled or no past work, wholly due to age differences); *See also Tom v. Heckler*, 779 F.2d 1250, 1256 (7th Cir. 1985).

[7] The significance of age remains unchanged under the Social Security Disability Benefits Reform Act of 1984, Pub. L. 98-460, 98 Stat. 1794, *codified at, inter alia*, 42 U.S.C. § 421(i). The Reform Act required the Secretary to revise the sequential evaluation for claimants already receiving benefits, but whose eligibility is being redetermined. *See* 50 Fed. Reg. 50135-50136, 50142-50143 (December 6, 1985), *codified at* 20 C.F.R. § 404.1594(f) and 416.994(b)(5). In explaining the revised test for such claimants, however, the Secretary emphasized the continued importance of age—and aging—to disability determinations:

> (4) Functional capacity to do basic work activities.
>
> (ii) Many impairment-related factors must be considered in assessing your functional capacity for basic work activities. *Age is one key factor.* Medical literature shows that there is a gradual decrease in organs function with age; that major losses and deficits become irreversible over time and that maximum exercise performance diminishes with age.
>
> 50 Fed. Reg. at 50132 (emphasis added).

claimant's age a significant, and often decisive, eligibility factor. Not all older (over 50) claimants will, of course, be found disabled; nor will younger claimants invariably be found not disabled. But the older a claimant is, the more he may be found to be unable to "engage in substantial gainful activity by reason of (his) medically determinable physical or mental impairment(s)." 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). Thus, two claimants with the same RFC, education and work experience, but of different ages (*e.g.*, 38 and 58), will generally have their claims adjudged differently: on the grid, the older claimant will usually win, and the younger claimant will lose. 20 C.F.R. Part 404, Subpart P, Appendix 2, *passim*. While age is thus a relevant vocational factor for all claimants, it is an especially significant one for older claimants.

II. THE SEVERITY STEP REGULATIONS UNLAWFULLY DENIED DISABILITY BENEFITS TO MANY OLDER CLAIMANTS WHO, UPON A FULL EVALUATION OF THEIR CLAIMS, SHOULD HAVE BEEN FOUND ELIGIBLE

A. The Severity Step Regulations, As Applied, Were Not A Valid *De Minimis* Step Under The Act

For many older claimants, the central statutory vice of the severity step regulations at issue here (20 C.F.R. §§ 404.1520(c) and 416.920(c)) was precisely that they were read and applied by the Secretary to preclude any consideration of how the claimants' "age" affected their ability to work. Under the sequential evaluation, the Secretary specifically "will not consider [a claimant's] age, education, and work experience." 20 C.F.R. §§ 404.1520(c) and 416.920(c). This regulation was given detailed interpretation by the Secretary in two SSRs that are binding on all decision makers on disability claims. 20 C.F.R. § 422.408. SSR 82-55 provided, *inter alia*, a list of impairments that would always be determined to be non-severe. SSR 82-55 at 104-06. This SSR called for a denial of every claim presenting the listed impairment(s) regardless of whether the claimant could prove that the listed impairment was severe enough to prevent him from doing his past work or severe enough to render him disabled when his

residual capacity to work despite the impairment was considered with his age and other vocational factors. *Id.* at 04; *see also* SSR 82-56 at 112. In addition, the Secretary directed that two or more "non-severe" impairments could never be combined to establish a severe impairment that satisfied step two. SSR 82-52 at 104; 20 C.F.R. § 404.1522(b) and 416.922(b) (1984). The reduction imposed on a claimant's actual abilities, measured by his RFC, would not be considered at step two. 20 C.F.R. §§ 404.1520 and 416.920; SSR 82-55 at 103. It is these regulatory sources, and not the recently promulgated SSR 85-28,[8] that defined the Secretary's step two severity test as applied to Ms. Yuckert below.

The Secretary now vigorously defends the legitimacy of a *"de minimis"* step two standard. Brief for the Petitioner ("Pet. Br.") at 17. Under this threshold test, as described by the Secretary himself, a claim may be denied at step two without an "individualized vocational evaluation" (i.e., without an individualized assessment of the effect that the claimant's age, education and work experience might have on his ability to work), only "where a medical assessment establishes that the claimant's impairment is sufficiently insubstantial that it reasonably could not be expected to preclude all substantial gainful activity, irrespective of the claimant's age, education and work experience." *Id.*, *see also id.* at 26-27 (similar formulations). In essence, a *de minimis* threshold step would, by its terms, allow summary "medical evidence" denials – denials without full consideration of the claimant's vocational factors. But it would only deny benefits to

[8] After the court of appeals decision below, the Secretary published a new Social Security ruling (SSR 85-28) that he describes as "clarifying the application of the severity standard at step two of the sequential evaluation process." Brief for the Petitioner at 10. Neither SSR 85-28 nor a later companion ruling (SSR 86-8) (Jan. 1986) were applied to respondent's case. For this reason, and others discussed by respondent in her brief, we agree (with respondent and the other *amici* urging affirmance) that it would be inappropriate for this Court now to consider the validity of these rulings in any way, particularly where there has been no opportunity for the development of a relevant factual record or for lower court scrutiny of the rulings in light of such record.

claimants who could not possibly meet their ultimate burden of proving disability because, *even if* their vocational factors *were* fully considered at step five, they would not establish an inability to engage in substantial gainful activity.

The Secretary plainly has the authority to "screen out" claimants with no likelihood of success on their claims, at an early stage of the eligibility determination process. And if the Secretary's step two severity regulations, at issue here, had been read and applied consistently with a *de minimis* standard, the step two severity test would have been consistent with the Act. This is because a *de minimis* test by its terms respects the statutory allocation of the burden of proof. Under this allocation, a claimant who shows an inability to do his past work shifts the burden to the Secretary to make a fully individualized assessment of whether his medical impairments render him unable, "considering his age, education and work experience, [to] engage in any other kind of substantial gainful work." 42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B).[9] The problem for the Secretary is that his severity regulations were neither read nor applied as a *de minimis* standard.

The case law establishes that the Secretary has not applied the severity regulations at issue here consistently with a *de minimis* standard.[10] Thus, claims were denied at step two even where consideration of vocational factors, especially age, might have resulted in a determination that the claimant met the statutory definition of disability.

[9] All twelve courts of appeals have interpreted the statutory allocation of the burden of proof in this way. *See Johnson v. Heckler*, 769 F. 2d at 1210 (citing cases). The court below properly held, *inter alia*, that the severity regulations transgressed this statutory allocation of the burden of proof. *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1986). *See also Johnson*, 769 F.2d 1202.

[10] *E.g.*, *Farris v. Secretary of Health and Human Services*, 773 F.2d 85, 90 (6th Cir. 1985); *Stone v. Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985); *Johnson v. Heckler*, 769 F.2d at 1212; *Flynn v. Heckler*, 768 F.2d 1273, 1274 (11th Cir. 1985); *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984); *Evans v. Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984). *Brown v. Heckler*, 786 F.2d 870, 872 (8th

(Footnote Continued)

At least until he rescinded SSR 82-55 in October 1985 and SSR 82-56 in January 1986, the Secretary's step two severity policies did not adhere to the rule that no case would be denied at the threshold unless the impairment(s) could not possibly prevent substantial gainful activity regardless of the claimant's vocational factors, most importantly age. By implementing a policy that did not even consider age in this general way to assess a claimant's impairments at the threshold of the evaluation, the step two severity policies ceased to be a *de minimis* screening test. This was because the severity policies mandated that an impairment which could never be found disabling for a younger individual could also never be found to disable an older claimant even if that claimant's actual RFC might be sufficiently limited to require a finding of disability after a full evaluation. *E.g.*, SSR 82-55. As such, claims of older claimants—that had previously been approved and would otherwise have been approved after a full evaluation—were being denied at step two.

That the severity regulations permitted claimants to be summarily denied benefits based on medical evidence alone, when some consideration of a claimant's vocational factors such as age might have shown them to be potentially eligible for benefits, is significant. For it was on this ground that the court below invalidated the regulations. The *Yuckert* court correctly noted that the Act required the Secretary to consider "both medical and vocational factors" for claimants who showed an inability to do their

---

Cir. 1986); *Hansen v. Heckler*, 783 F.2d 170 (10th Cir. 1986); *Yuckert v. Heckler*, 774 F.2d at 13; *Baeder v. Heckler*, 768 F.2d 547 (3rd Cir. 1985). *See also Dixon v. Heckler*, 785 F.2d at 1105. All of these decisions, including all of those that the Secretary cites in support of his position (at Pet. Br. 17-18), read the Act to invalidate any threshold severity step that authorizes the summary (medical evidence only) denial of benefits to any claimant with more than a *de minimis* impairment, and found that the severity policies at issue here exceeded that permissable bound. The only difference among the courts of appeals rulings is that some courts imposed a *de minimis* interpretation on the existing step two regulations, while others opted to strike down the regulations while allowing for—even inviting—the promulgation of valid step two regulations. The first six cases cited comprise the first group; the others, including the ruling below, the second. The only distinction among the cases, therefore, lies in the remedial avenue chosen to achieve compliance with the Act's requirements.

past work, *i.e.*, in making the ultimate determination of disability. *Yuckert*, 774 F.2d at 1368, 1369-70; *see* 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(A). Since the severity regulations precluded the consideration of vocational factors at all—when such consideration could make a difference in the ultimate determination of disability—the *Yuckert* court concluded that the regulations "conflict with the language of the statute that requires the Secretary, in determining disability, to consider [vocational] factors." *Yuckert*, 774 F.2d at 1369.[11]

B. The Severity Regulations, As Applied, Had A Disproportionately Adverse Impact On Older Claimants

In transgressing the permissible statutory bound of a threshold severity step, the Secretary's severity step regulations worked a disproportionate hardship on older (over 50) claimants. Older claimants, in particular, have been most wronged by the Secretary's step two severity policies because the complete exclusion of age at the severity step effectively preempted application of the grid concept that beginning after age fifty a less severe impairment can be disabling. *See supra* pp. 7-11. The result has been that claims were denied at step two when, if there had been full consideration of the medical evidence and vocational factors, the claim should have succeeded under the Act. Thus, the step two denial precluded claims raising more than *de minimis* impairments for elderly claimants.

---

[11] AARP sharply disagrees with the Secretary's reading of *Yuckert*. He reads *Yuckert* to "require the decision maker to consider the vocational factors of age, education and work experience" at step two of the sequential evaluation process and, therefore, to prohibit the Secretary from employing any threshold "severity step" at all. *E.g.*, Pet. Br. at [illegible]. But the *Yuckert* court's reference to the required consideration of vocational factors is not an order to SSA that it consider such factors at the second step; rather, it explains why a step two severity test that precluded eligible claimants from proving disability by reference to vocational factors (*at a later step*) is not valid. *Yuckert*, 774 F.2d at 1370. For the same reason, *Yuckert's* invalidation of the severity regulations does not prohibit the Secretary from implementing a *de minimis* threshold step that, unlike the severity step, implicity considers these vocational factors.

The reported cases confirm the disproportionate impact. Thus, most of the claimants whose step two severity denials were reversed by the courts – on the ground that the severity regulations (applied to their claims) dictated a stricter than *de minimis* standard or had been read and applied by the Secretary in that (strict) fashion – were individuals age 50 or older.[12]

The facts of just three of these cases – one concerning a claimant "approaching advanced age," one a claimant "of advanced age" and one a claimant "close to retirement age," *see* 20 C.F.R § 404.1563(a), 416.963(c) – are instructive. They graphically demonstrate how faithful application of the severity step regulations resulted in a denial of disability benefits to older claimants (in each of the Secretary's own older age categories), even though the claimants met the statutory test to establish disability.[13]

[12] *E.g., Brown v. Heckler*, 786 F.2d 870, (8th Cir. 1986) (age 62); *Andrades v. Secretary HHS*, 790 F.2d 168 (1st Cir. 1986) (age 50); *Munoz v. Secretary HHS*, 788 F.2d 822 (1st Cir. 1986) (age 62); *Hansen v. Heckler*, 783 F.2d 170, 172 (10th Cir. 1986) (age 55); *Johnson v. Heckler*, 769 F.2d 1202 (Johnson age 55; Montgomery age 54); *Flynn v. Heckler*, 768 F.2d 1273 (11th Cir. 1985) (age 64); *Baeder v. Heckler*, 768 F.2d 548 (3rd Cir. 1985) (age 55); *Stone v. Heckler*, 752 F.2d 1099, 1100 (5th Cir. 1985) (age 62); *Davis v. Heckler*, 748 F.2d 293, 294 (5th Cir. 1984) (age 58); *Estran v. Heckler*, 745 F.2d 340, 341 (5th Cir. 1984) (age 58); *Evans v. Heckler*, 734 F.2d 1012, 1013 (4th Cir. 1984) (age 57); *Taylor v. Heckler*, 739 F.2d 1240, 1241 (7th Cir. 1984) (age 61); *Delgado v. Heckler*, 722 F.2d 570, 571 (9th Cir. 1983) (age 61); *Chico v. Schweiker*, 710 F.2d 947, 748 (2nd Cir. 1983) (age 57); *Blackburn v. Heckler*, 615 F.Supp. 908, 909 (N.D. Ill. 1985) (age 56); *Moody v. Heckler*, 612 F.Supp. 815, 824 (C.D. Ill. 1985) (age 52); *Oster v. Heckler*, 594 F.Supp. 523, 524 (D.N.D. 1984) (age 55); *Dixon v. Heckler*, 589 F.Supp. 1494, 1499 (S.D. N.Y. 1984), *affirmed* 785 F.2d 1102 (2nd Cir. 1986) (Carrasquillo age 59; Ramirez age 54); *McCullough v. Heckler*, 583 F.Supp. 934, 938 (N.D. Ill. 1984) (age 57); *Hundrieser v. Heckler*, 582 F.Supp. 1231 (N.D. Ill. 1984) (age 58); *Lucena v. Secretary HHS*, 572 F.Supp. 130 (D.P.R. 1983) (age 61); *Clemente v. Schweiker*, 564 F.Supp. 271, 272 (E.D.N.Y. 1983) (age 62); and *Scruggs v. Schweiker*, 559 F.Supp. 100, 104 (N.D. Tenn. 1982) (age 52).

[13] The facts of respondent's case are concededly not as telling. While AARP believes that Ms. Yuckert will be able to prove her eligibility for benefits if her claim is fully developed on remand and not short-circuited by a step two denial, her record at this point is not developed to an extent that clearly establishes her eligibility for benefits. The reported cases include literally dozens of courts

(Footnote Continued)

John Clemente, for example, was 62 years old; he had worked for 49 years as a longshoreman. *Clemente*, 564 F.Supp. at 272. There was no dispute that his residual capacity to work was less than that required by his medium and heavy past work. *Id.* His RFC was limited due to medical impairments that included three herniated discs[14], chronic bronchitis and emphysema, cervical (neck and shoulder) spondylosis rendering him unable to look up or down or to lift objects, hearing loss, and heart disease. *Id.*[15] Nevertheless, the ALJ ruled that all of his impairments were nonsevere because they were part of the "aging process", and he could do "most jobs." *Id.* In fact, had his claim been evaluated on the light grid, Clemente would have been found unable to work in any jobs. *E.g.*, 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 202.04 (light RFC).[16]

of appeals decisions – all disapproving the Secretary's step two severity policies – that the Secretary might plausibly have brought to this court for review. He chose, however, to press the case of an individual claimant who had never even seriously challenged the regulations at issue (*Yuckert*, 774 F.2d at 1367) and never developed the factual record that might ordinarily accompany such a challenge. *Compare Yuckert* with *Dixon v. Heckler*, 785 F.2d 1102 (2nd Cir. 1986). AARP is not suggesting that the choice of an undeveloped claim was an ethically impermissable one; but this Court should not assume that Ms. Yuckert's case as currently developed is truly representative of claimants denied disability benefits on the ground that their impairments were "not severe."

[14] "Herniated discs" are ruptured intervertebral discs (nucleus pulposus) that protrude outside of the disc space. Symptoms of pain, weakness, muscle spasms, etc. result from the protrusion pressing onto the central nervous cord or a nerve root. The Merck Manual at 1466-71 (Berkow, 13th Ed. 1977).

[15] "Spondylosis" indicates degenerative changes of the spine in the vertebrae around the disc space and is usually associated with chronic, i.e., permanent, disc disease. Stedman's Medical Dictionary, Williams and Wilkin (24th Ed. 1982). *See also* The Merck Manual at 1469 (1977).

[16] Other illustrative nonsevere denials that were successfully appealed by claimants in this "closely approaching retirement age" (60-64) category include: *Brown*, 786 F.2d at 870 (Medical impairments are (1) cervical (neck), lumbar [lower back] spine arthritis; (2) early obstructive lung disease; and (3) psychophysical musculoskeletal reaction which closely approached the step three listing at 20 C.F.R. part 404, Subpart P, Appendix 1, § 12.07, all of which

(Footnote Continued)

A review of the cases reporting "not severe" denials of claimants age 55-60 tells the same story. Edwin Oster, for example, was 55 years old. *Oster*, 594 F.Supp. at 524 (D.N.D. 1984). He was illiterate, and his past work was as a livestock handler and egg handler. *Id.* The ALJ found him disabled because he was limited to sedentary RFC due to a heart condition described as three vessel coronary artery disease that also caused right arm numbness after exertion, emphysema, and back problems. *Id.* at 524, 527. The Appeals Council reversed the favorable decision and ruled that the proper decision was a nonsevere denial even though Oster could not perform his past work due to his impairments. As the ALJ had shown, a full evaluation of the claim mandated the award of benefits.[17]

---

establishes her medical inability to perform past clerical work); *Flynn*, 768 F.2d at 127 (Medical impairments are: essential hypertension, with related headaches, dizziness, and end organ changes creating a high risk of stroke or heart attack and establishing her medical inability to return to her past work); and *Taylor*, 739 F.2d at 1241 (Medical impairments are: (1) depression rendering her unable to perform tedious tasks, be near children or get out of bed and (2) arthritis with pain and swelling in her hands which established her inability to continue her 22 year career as an elementary school teacher).

[17] Other illustrative nonsevere denials that were successfully appealed by claimants who were of "advanced age" include: *McCullough*, 583 F.Supp. at 938 (Medical impairments are: thrombophlebitis (blood clot) in left leg that limited him to light RFC establishing his medical (RFC) inability to do his past work and, under the grid Rule 202.01, his right to benefits); *Estran*, 745 F.2d at 341 (Medical impairments are: mental retardation (I.Q. of 69), depressive neurosis, somatization disorder, arthritis, angina, and complaints of dizzy spells establishing impairments that met the step three listing. 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.05(c) (1986)); *Evans*, 734 F.2d at 1013-14. (Medical impairments are, *inter alia*, asthma with bronchitis, hypoxemia (low oxygen in the blood), and moderately severe chronic obstructive pulmonary disease with bronchospasm that led the Veterans Administration to find him "totally and permanently" disabled and establishing impairments that met or equalled the step three listing); *Hundreiser*, 582 F.Supp. at 1234. (Medical impairments are: a degenerative knee problem requiring surgery and that he walk with a cane, carpal tunnel syndrome (pain, numbness and reduced ability to grasp or hold objects) in the nerves of both hands, degenerative disc disease, and hypertension establishing, even according to the ALJ, the medical (RFC) inability to perform his past heavy work as a maintenance mechanic); *Johnson*, 769 F.2d at 1206. (Medical impairments are diabetes mellitus, lumbago, duodenal ulcer,

(Footnote Continued)

Finally, in the 50-54 year category, the examples are as stark. Mr. Moody, a 52-year-old former bartender, was denied benefits at step two even though he had principally resided in a state mental health center, nursing homes, or alcoholism treatment centers due to his impairments. *Moody*, 612 F.Supp. at 824. His impairments were heart disease (possible post infarction with an abnormal electrocardiogram, and angina pain), chronic obstructive pulmonary (lung) disease, personality disorders (diagnosed as passive/aggressive, explosive, and paranoid), depression, alcoholism, and leg pains due to intermittent claudication.[18] *Id.* at 824-825. The Court found that each impairment considered alone met the statutorily authorized *de minimis* test because each limited Mr. Moody more than slightly.[19]

The facts of these cases, and a review of the others, conclusively establish the adverse impact that step two severity policies as applied by the ALJs and the Appeals Council had on older

---

Echazski's ring of the esophogus and anxiety neurosis establishing her RFC as sedentary rendering her unable to perform her past medium work as a nurse's aide and eligibility under the grid, 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.01).

[18] "Intermittent claudication" is "a condition caused by ischemia of the muscles due to sclerosis with narrowing of the arteries; it is characterized by attacks of lameness and pain, brought on by walking, chiefly in the calf muscles; however, the condition may occur in other muscle groups." Stedman's Medical Dictionary at 288.

[19] Other cases where the step two "not severe" denial was successfully appealed by claimants who were closely approaching "advanced age" include: *Dixon*, 589 F.Supp. at 1499-1500 (the medical impairments of Raminez, one of the named plaintiffs, are: the loss of one eye, chronic low back pain syndrome, and degenerative changes at the lumbosacral (lower back) spine establishing limited range of motion to 20° straight leg raising (instead of 90°) and 30° bending at the knee (instead of 110°) which established a medically reduced RFC). *Johnson*, 769 F.2d at 1206 (Medical impairments of Montgomery are: hypertension, ischemic heart disease with angina pectoris, diabetes, mild obesity, degenerative osteoarthritis of the spine, and the residual effects of fractures of the hip, leg, and foot, which limited him to sedentary RFC establishing inability to perform his past heavy work as a butcher and leading the ALJ to find Mr. Montgomery disabled at step five. 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.01. The Appeals Council overruled the ALJ "error" to issue a "not severe" denial despite the limited RFC and inability to do past work).

claimants. In particular, many of these older claimants would have succeeded had their age and inability to perform their past work due to their medical impairments been factored into the severity threshold test, as is contemplated by a valid *de minimis* step.

Where the denials of step two reached a peak of 45.2% of all the final disability decisions in 1981, House Committee on Ways and Means, 98th Cong. 1st Sess., WMCP 98-2, "Background Material and Data" at Table 3, p. 79 (Feb. 8, 1983), and the cases reaching the Court reflected denials defended by the Secretary which far exceeded that which would indicate application of a *de minimis* step, AARP fails to see how the Secretary can now, in good faith, defend his step two regulations as *de minimis*. Since the Court below invalidated the regulations as applied, that decision should be affirmed. If the Secretary wishes to develop a valid screening step in his sequence, the order below in no way prevents him from doing so by promulgating a new regulation. The present step, however, should not be allowed to continue to be used to the detriment of all – but in particular older – claimants.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: New York, New York
October 7, 1986

Respectfully Submitted,

MILLER, SINGER & RAIVES, P.C.
ALFRED MILLER
PETER N. GREENWALD
555 Madison Avenue
New York, New York 10022
(212) 752-8830

ATTORNEYS FOR THE AMERICAN ASSOCIATION OF RETIRED PERSONS

STEVEN ZALEZNICK
MICHAEL R. SCHUSTER

American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049